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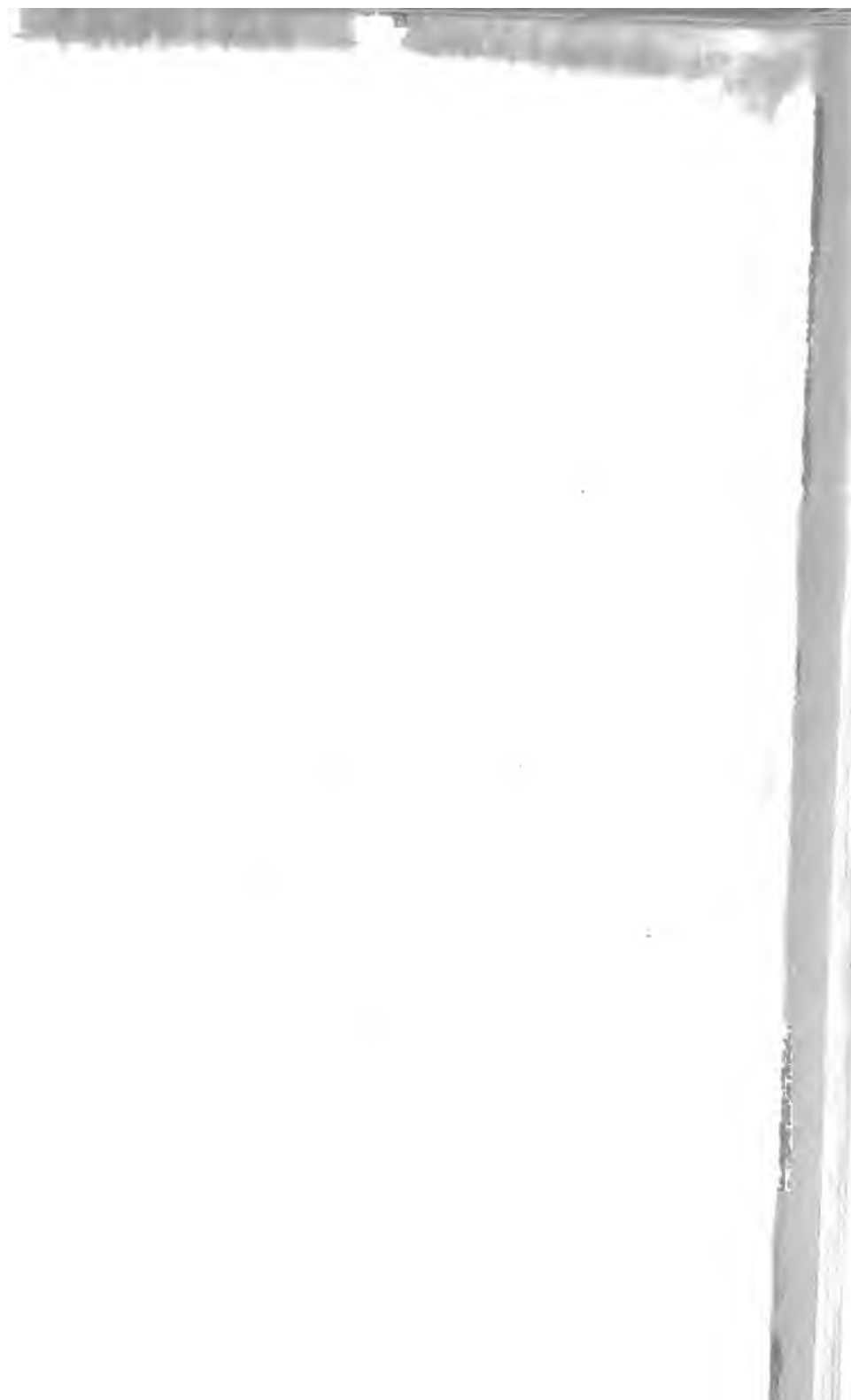
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. XL

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SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1882.

121680

JUL 29 1942

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JOHN RITCHIE,
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FREDERICK STONE.*

* Elected November 8, 1861, vice Daniel Randall Magruder.

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 CHARLES ANDREWS, CHIEF JUDGE.†
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 BENJAMIN F. TRACEY.‡

PENNSYLVANIA.

GEORGE SHARSWOOD, CHIEF JUSTICE.
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* Resigned November 14, 1881.

† Appointed November 19, 1881, vice Charles J. Folger.

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- Laughlin v. Railway** (28 Wis. 204; s. c., 9 Am. Rep. 493), denied; **Marquette, etc. R. Co. v. Kirkwood** (45 Mich. 51), 455.

XXXIV CASES OVERRULED, DOUBTED AND DENIED.

- Launier v. Francis** (28 Mo. 181), denied; **Barkley v. Wilcox** (86 N. Y. 140), 522.
Liford's Case (11 Co. 51), denied; **Trubee v. Miller** (48 Conn. 347), 180.
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Martin v. Riddle (26 Penn. St. 415), denied; **Barkley v. Wilcox** (86 N. Y. 140), 522.
Ogburn v. Connor (46 Cal. 346; 13 Am. Rep. 213), denied; **Barkley v. Wilcox** (86 N. Y. 140), 522.
Pennsylvania R. R. Co. v. Kerr (62 Penn. St. 358; 1 Am. Rep. 431), denied; **Billman v. Indianapolis, etc., R. R. Co.** (76 Ind. 166), 234.
Prout v. Wiley (28 Mich. 164), denied; **Bingham v. Barley** (55 Tex. 271), 808.
Roberts v. Robeson (27 Ind. 454), denied; **Hanna v. Read** (101 Ill. 596), 614.
Rodrigas v. East River Savings Institution (63 N. Y. 485; 20 Am. Rep. 555), doubted; **D'Arusment v. Jones** (4 Lea, 251), 13.
Ryan v. N. Y. Cent. R. R. Co. (35 N. Y. 210), denied; **Billman v. Indianapolis, etc., R. R. Co.** (76 Ind. 166), 234.
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Thorpe v. Thorpe (N. Y. Superior), overruled; **Van Voorhis v. Brintnall** (86 N. Y. 18), 510.
Thurtell v. Beaumont (1 Bing. 389), denied; **Hills v. Goodyear** (4 Lea, 238), 8.
United States v. Allsbury (4 Wall. 186), denied; **Hellams v. Abercrombie** (15 S. C. 110), 689, 690.
Vatterlien v. Howell (5 Sneed, 491), overruled; **Richardson v. Rice** (9 Baxt 290), 93.
Williams v. Tilt (36 N. Y. 325), denied; **Nance v. Gregory** (6 Lea, 343), 46.
Wormley v. Sanford (52 Ill. 158), denied; **Barkley v. Wilcox** (86 N. Y. 140), 522.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

HORTON V. MAYOR AND CITY COUNCIL.

(4 Lea, 39.)

Municipal corporation — sewer — mode of construction — damages — nuisance.

A court of equity has no power to compel a city to construct a sewer, nor jurisdiction of a claim of damages for injuries by the improper construction of one, except where the operation of the sewer may be enjoined as a nuisance.*

BILL to compel construction of a sewer and for damages. The opinion states the case. The complainant had judgment below.

W. H. Humphreys, for complainants.

W. K. McAllister, for defendants.

COOPER, J. The chancellor overruled a demurrer to the bill, and the defendant appealed. It appears from the bill as amended, and as it comes before us, that complainant, Anna E. Horton, wife of J. W. Horton, became, on February 20, 1875, the owner for life, with remainder to her two children, by deed of gift from her

* See *Fair v. City of Philadelphia* (88 Penn. St. 309), 32 Am. Rep. 455; *City of Denver v. Capell* (4 Col. 26), 34 Am. Rep. 62.

Horton v. Mayor and City Council.

father, of an improved lot on Broad street, in Nashville, fronting twenty-three feet eight inches on Broad street, and running back one hundred feet. In the year 1872, the corporate authorities of the city constructed a sewer across Broad street, and under the house erected on said lot, and other houses adjoining thereto, upon a lot in the rear, and thence by open drain into Wilson's Spring branch.

This sewer was at first sufficient for the purpose intended, but the corporate authorities from time to time constructed other sewers and surface gutters, and connected them with the original sewer, whereby the latter became the only means of escape for the water and foul drainage of a large additional territory, the rainfall of which territory would not naturally flow upon the property in question, but would find its way to the river in other directions. The result is that the volume of drainage, in hard rains, breaks open the sewer under the house, injuring the walls and articles stored therein, rendering the cellar valueless, and by filling the upper rooms with foul gases and effluvia making the building unhealthy and unfit for either residence or business. The sewer has also been permitted negligently, from time to time, to become obstructed, so that the property of complainant, and other property on both sides of Broad street, were flooded by sewage and injured. On September 30, 1876, the city engineer called the attention of the corporate authorities to the insufficiency of the sewer for the drainage thrown upon it, and to the necessity of a new sewer along Broad street to the river. On March 26, 1878, the mayor of the city, in a message to the common council, called their attention to the condition of the sewer, and recommended the construction of a new sewer along Broad street to the river. And just before the filing of the bill, on October 1, 1878, the complainants petitioned the corporate authorities for a removal of the nuisance and for damages, without avail. The prayer of the bill is that the corporate authorities be, by the final decree, compelled to construct a sewer along Broad street to the river, and such other side drains as may be necessary to secure the health of the city and remove the nuisance created by the defective sewerage mentioned, and that complainants be allowed such damages as may be just and proper for the injuries sustained.

The main object of the bill is to compel the city, by mandatory decree, on final hearing, to construct a new sewer from complain-

ant's lot along Broad street to the river, a distance as shown by the bill of 1,660 feet. The ground of demurrer assigned to this part of the relief sought is that the building of a public sewer by a municipal corporation is the exercise of a legislative discretion which the court will not control. And to this effect are the authorities.

The reason for the rule has been admirably stated by DENIO, Ch. J., in *Mills v. City of Brooklyn*, 32 N. Y. 495. "It is not the law," he says, "that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every or for any part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens, but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time in which improvements shall be made. It involves also a variety of providential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunals. The court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations which might bear upon it could be brought to their attention in the course of a single trial. Such a system would be as vexatious in practice as unwarranted in law." The distinction between the political or discretionary powers of the governing body of a municipal corporation and the exercise by the corporate authorities of ministerial powers is everywhere recognized. *Dill. Mun. Corp.*, §§ 753, 778, and cases cited.

No authority has been produced tending to show that a Court of Chancery has ever undertaken to compel a municipal corporation to construct a sewer in a particular direction, or of specified dimen-

sions. If such a power exists in the court, it may be exercised to control the discretion of the local legislature in opening, grading and improving streets, or in any other matter about which that body may be authorized to legislate. The corporate functions would no longer depend upon the deliberate action, after consideration of all the circumstances, including the ways and means of the municipal council but upon the verdict of a jury or the decree of a court. Both reason and authority are against the power of the Chancery Court to grant the relief sought.

The remaining object of the bill is to recover damages for the injury sustained by the complainants by the overflow of the sewer, either by reason of its insufficiency in size to carry off the drainage, its defective construction, or its being negligently permitted to become obstructed.

Although the city authorities are intrusted with a discretion in regard to constructing drains and sewers in the first instance, yet when they have constructed them, it is probably their duty to keep them in proper repair and free from obstruction. *Mayor of N. Y. v. Farze*, 3 Hill, 612; *Wilson v. Mayor*, 1 Denio, 601; *Hutson v. Mayor of N. Y.*, 9 N. Y. 163; *Barton v. City of Syracuse*, 36 id. 54; *McCarthy v. Syracuse*, 46 id. 194 *Meares v. Wilmington*, 9 Ired. 73. And they are liable in damages for a neglect of these ministerial duties by which individuals suffer injury. It is certain also that equity has jurisdiction to enjoin and abate nuisances. 2 Story Eq. Jur., § 925; 2 Dan. Ch. Pr. 1635. And this jurisdiction is not interfered with by the provisions of the Code conferring on the courts of law the power to abate nuisances in proper cases. *Lassater v. Garrett*, 4 Baxt. 368. The continuance of a nuisance is also a new offense. *Nashville & Decatur R. R. Co. v. State*, id. 55. But the jurisdiction of equity to give damages is incidental to its jurisdiction to interfere by injunction or upon some recognized ground of equity. 2 Story Eq. Jur., §§ 296, 924. A suit for damages merely cannot be maintained, and is not authorized by the act of 1877, ch. 97, which expressly excepts from the new jurisdiction conferred all causes of action for injuries to property involving unliquidated damages.

The bill before us does not ask either a temporary or perpetual injunction of any kind. Nor is it easy to see how it could. The sewer complained of must have been constructed with the knowledge and acquiescence of the owners of the property at the time. The complainants have perhaps neither the right nor

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the inclination to abate it *in toto*. What they want and ask is a new sewer altogether and damages for the injuries done. The former the court cannot give for the reasons stated, and the remedy for the latter is at law.

Reverse the decree and dismiss the bill with costs.

HILLS V. GOODYEAR.

(4 Lea, 238.)

Evidence — rule as to preponderance, in civil action involving criminal charge.

In an civil action involving a charge of forgery by one of the parties, the mere preponderance of the entire evidence, including that of good character, if any, and taken in connection with the legal presumption of innocence, must prevail.*

ACTION on a bond. The opinion states the facts. The plaintiff had judgment below.

Humes & Poston, for Hills.

J. R. & W. S. Flippin and *R. D. Jordan*, for Goodyear.

COOPER, J. In December, 1871, Hills bought the interest of Goodyear in their partnership business, agreeing to assume and pay the partnership debts, and giving Goodyear a bond, with sureties, to indemnify him against them.

This suit was brought by Goodyear on the bond against Hills and his sureties, to recover the amount of a note, alleged to be a partnership note, which he had been compelled to pay. Issues were joined on the pleas of covenants performed, set-off by account for money had and received, and that the note was not covered, nor intended to be covered by the bond of indemnity.

The plaintiff recovered judgment, and the defendant appealed in error.

The bill of exceptions says that the plaintiff offered evidence tending to show that after his sale he was compelled to pay, and did pay a note of the firm, dated April 12, 1871, for \$250, which is set out in the record.

* To same effect, *Welch v. Jugenheimer*, 56 Iowa, 11.

The defendant then offered evidence tending to show that the note was the individual note of the plaintiff, not of the firm; that the money received on it was handed to the book-keeper of the firm without explanation, placed to the credit of the plaintiff, and used in paying a note of the firm in bank; that the plaintiff drew out cash at various times, amounting to \$143, against his individual credit; that although the note shown in evidence was signed in the firm name, it was not the note given; that the plaintiff's own note was originally given, and the note exhibited made by plaintiff, just before the bringing of the suit, for the purpose of being used in the suit, and never delivered to the payee; that plaintiff in November, 1871, collected certain specified accounts due the firm, and never paid the money into the firm nor reported collection, and that at the date of the sale the books showed the claims uncollected.

The plaintiff in rebuttal offered evidence tending to prove that he did not draw out cash against the credit of \$250; that the note was originally the firm note, not his note; that he notified defendant that it was outstanding before the sale; that he promptly on December 5, 1871, entered on the books a part of his alleged collections, paid over the residue to the firm, and gave the book-keeper a memorandum thereof to be entered on the books.

The defendant then offered evidence, that although there was an entry on the books under the date of December 5, 1871, in the plaintiff's handwriting, it was made after the purchase, and was fraudulently altered to the other date.

The plaintiff then offered evidence of his good reputation for honesty, integrity and veracity, which was admitted upon the defendant's attorney stating that his client intended to insist that the note in controversy was forged by the plaintiff; that the plaintiff fraudulently withheld moneys collected by him, and made false entries on the books.

The bill of exceptions says that the charge of the judge is not set out, as it was believed to be correct, except the following charge excepted to at the time, which was the only charge on the particular point: "That inasmuch as the facts set up as a defense involved serious charges of moral dereliction against the plaintiff, they must be established clearly and to the entire satisfaction of the jury."

The defendant requested the judge to charge as follows, which he refused to do: "A preponderance of the evidence however slight is sufficient for the jury to find any fact involved in this cause, al-

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though the finding of such fact may establish the grossest misconduct, or even criminal misconduct, upon the part of the plaintiff."

The only errors relied on for reversal are assigned upon the charge made and the charge refused.

The distinction between civil and criminal cases in respect to the degree or quantity of evidence required to justify the finding of the jury is well settled. In criminal trials the minds of the jury in favor of life and liberty must be convinced beyond a reasonable doubt. 2 Greenl. Ev., § 29. In civil cases the duty of the jury is to weigh the evidence carefully and to find for the party in whose favor it preponderates, although their minds be not satisfied beyond a reasonable doubt. As a general rule a mere preponderance of evidence however slight must necessarily turn the scale. *Chapman v. McAdams*, 1 Lea, 500; *Knowles v. Scribner*, 57 Me. 497; *Gordon v. Parmelee*, 15 Gray, 413; 2 Whart. Ev., § 1246, note 1.

At an early day one exception to this rule was recognized, which is yet sustained by the weight of authority. If in an action for libel or slander the defendant rely in justification upon the truth of the defamatory charge, he is held to prove it beyond a reasonable doubt. *Chalmers v. Shackell*, 6 C. & P. 478; *Woodbeck v. Keller*, 6 Cow. 118; 2 Greenl. Ev., § 426.

Following the exception, it has been held in this State that a plea justifying a charge of perjury must be sustained by two witnesses, or one witness with strong corroborating circumstances. *Coulter v. Stuart*, 2 Yerg. 225. It has also been held that a plea of justification not sustained is adding aggravation to injury. *Wilson v. Nations*, 5 id. 211. The logical result would be that proof tending to prove the truth of the charge, but falling short of establishing it, ought to be inadmissible. Yet after a struggle, both in England and in a majority of the States of the Union, it has been settled that facts and circumstances tending to prove but not proving the truth of the charge, may be received in mitigation, even where there is a plea of justification. *West v. Walker*, 2 Swan, 32; 2 Greenl. Ev., § 425. Some of the State courts "with less justice though better logic," have held otherwise. *Bush v. Prosser*, 11 N. Y. 347; *Knight v. Foster*, 39 N. H. 576. The reason for the exception from the general rule has been well stated by DEPUE, J., in a recent opinion of the Court of Errors and Appeals of New Jersey: "In putting his justification on the ground of the plaintiff's guilt of the accusation, the defendant undertakes to prove the

plaintiff's guilt, which comprises not only the doing of the act, but also the intent which the law denounces as criminal." *Kane v. Hibernia Ins. Co.*, 39 N. Y. 697; s. c., 23 Am. Rep. 329. Four of the judges of that court reserved the point which was not then actually before the court, whether there ought to be any exception from the general rule in this class of cases. And the mere preponderance rule was applied to such a case in *Ellis v. Buzzell*, 60 Me. 209; s. c., 11 Am. Rep. 204.

The tendency of modern decisions is to do away with any exception to the rule. A striking instance is found in the analogous cases of suits upon fire policies, where the defense is that the property insured was willfully burned by the plaintiff himself. There is an early English decision to the effect that the crime in such a case should be so fully proved as to warrant a finding of a verdict of guilty upon an indictment. *Thurtell v. Beaumont*, 1 Bing. 339. It appears however from the cases cited in the note to 2 Whart. Ev., § 1246, and a discriminating collation of the authorities in 17 Am. Law Reg. 302, that only two States, Illinois and Florida, have followed this decision, while it has been repudiated and the rule of a mere preponderance of evidence applied to such cases, in the States of Vermont, Massachusetts, Kentucky, Missouri, Louisiana and Wisconsin, and in the courts of the United States in the sixth and seventh circuits. And in *Kane v. Hibernia Ins. Co.*, *supra*, the highest court of New Jersey, by the unanimous vote of the eleven judges sitting, adopted the latter view, the learned judge who delivered the opinion undertaking to show that the original decision, making this class of cases an exception to the general rule of the preponderance of evidence, has been ignored of late years in England. The exception is still laid down as law in 2 Greenl. Ev., § 408, although the only American authority cited is to the contrary (*Hoffman v. Western Ins. Co.*, 1 La. Ann. 216), and is approved in 1 Taylor on Ev. 97a. It is dissented from by Mr. Wharton, *supra*, and by Mr. May in an article in 10 Am. Law Rev. 642.

The general rule has been adhered to in other cases involving issues charging or implying crime. In an action on a promissory note, it has been held that the defense that the note was obtained by false and fraudulent representations might be sustained by a preponderance of evidence, as in other civil cases, although the defense was based on a charge of fraudulent representations such as might be the subject of a criminal prosecution. *Gordon v. Parmelee*, 15

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Gray, 413. So where the action was in trespass for burning the plaintiff's building, and the evidence showed that the defendant, if guilty of trespass, had set fire to the building designedly, and was guilty of the crime of arson, the court held that the issue might be determined by the fair preponderance of evidence. *Bradish v. Bliss*, 35 Vt. 326. So where the action was on a statute which gave the right to recover the treble value of property feloniously taken. *Munson v. Atwood*, 30 Conn. 102. So in trover where the evidence was such as to involve a charge of larceny. *Bissel v. Werl*, 35 Ind. 54. So in a bastardy case. *Knowles v. Scribner*, 57 Me. 497.

It does not follow however that a party who is charged in a civil case with crime or moral dereliction, may not have the benefit of good character and the presumptions of law in favor of innocence. Evidence of good character is admitted in criminal prosecutions because the intent with which the act, charged as a crime, was done, is of the essence of the issue, and the prevailing character of the defendant's mind, as evinced by his previous habits of life, is a material element in discovering that intent. Upon the same principle the like evidence ought to be admitted in all other cases, whatever be the form of proceeding, when the intent, to be found as a fact, is involved in the issue. 1 Greenl. Ev., § 54, note; *Ruan v. Perry*, 3 Cai. 120; *Fowler v. Aetna Ins. Co.*, 6 Cow. 675; *Townsend v. Graves*, 3 Paige, 455. Our decisions are in accord. *Scott v. Fletcher*, 1 Tenn. 488; *Henry v. Brown*, 2 Heisk. 213; *Spears v. International Ins. Co.*, 1 Baxt. 370.

The admission of evidence of character is not assigned as error in the case now before us.

The law in all cases, civil or criminal, presumes innocence. Obviously therefore, to create a preponderance of evidence in a civil case, where crime is imputed to one party, the other party assumes the burden of not only overcoming the evidence of his opponent, by a preponderance, but of overcoming also the presumption of law in favor of the innocence of his adversary. In other words, there is no preponderance on the side of the charge of guilt, unless the evidence is sufficient to overbalance the opposing presumption as well as the opposing evidence, including evidence of character. *Knowles v. Scribner*, 57 Me. 497; *Ellis v. Buzzell*, 60 id. 209; s. c., 11 Am. Rep. 204; *Bradish v. Bliss*, 35 Vt. 326. The difficulty has been in so wording a charge as to give the party implicated the benefit of the

law without breaking down the distinction between civil and criminal cases, there being clearly no intermediate rule between the general rule in the one class and the general rule in the other. *Bradish v. Bliss*, 35 Vt. 326. The difficulty will be found illustrated in the cases just cited, and in *Rothschild v. Ins. Co.*, 62 Mo. 356, and *Thayer v. Boyle*, 30 Me. 475. The result has been to construe charges liberally, leaving a margin for the exercise of judicial discretion in the particular case. Strictly speaking, the application of the general rule by which the jury is guided in finding a verdict is not affected by the fact that evidence of character has been properly introduced, or a case made for the operation of the rule of legal presumption in favor of innocence. A mere preponderance, however slight, will still suffice to turn the scale, but to sustain a finding of crime, it must be a preponderance sufficient to outweigh the opposing evidence, including evidence of good character, if any, and the presumption in favor of innocence. The court should instruct the jury upon the legal effect of the evidence of character or presumption of innocence, and it is the duty of the jury to weigh these elements, in connection with the other proof, in arriving at a conclusion on which side the preponderance exists.

If therefore, upon the idea that the judge, in the case before us, was bringing the criminal rule of evidence into a civil case, the defendant had presented a request embodying a correct exposition of the true rule, he would have been clearly entitled to it. He had, by the course he chose to pursue, made crime, involving a felonious intent, an element of defense, although not necessarily embraced in his pleading, nor perhaps essential to his defense. The plaintiff became thereby entitled to the benefit of his character, if good, and to the presumption in favor of innocence.

The defendant was not therefore entitled to the charge as embodied in his request. It would have been in the form in which it was presented, under the facts of the case, altogether misleading. It was not the mere preponderance of the testimony on any fact involved in the cause which must decide, but the preponderance of the entire evidence on the issue joined, including that relating to character, and taking into consideration the presumption of innocence. The "preponderance of testimony" moreover means "the weight, credit and value of the aggregate evidence on either side," upon the issues joined, not upon particular facts. *Coles v. Wrecker*, 2 Tenn. Leg. Rep. 14.

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The only doubt is as to the correctness of the charge given. If his honor had called the attention of the jury to the testimony touching character, and the presumption in favor of innocence, and had then said to them that the charges must be "established clearly and to the entire satisfaction of the jury," the language would perhaps be subject to the criticism that it approximated too nearly to the rule as usually announced in criminal cases. But the bill of exceptions tells us that the charge made was all that was said on the subject. In that view, the question is whether the language was intended to lay down a wrong rule, or merely states, in a general way, what was equivalent, under the circumstances, to the general rule.

It is conceded not to be error for a judge to call the attention of the jury to the gravity of the charge made in such a defense as was relied on in this case, and to put the presumption of innocence in the scales as an element to weigh in favor of the plaintiff, "if the evidence was not entirely satisfactory." *Kans v. Hibernia Ins. Co.*, *supra*; *Scott v. Ins. Co.*, 1 Dill. 105; *Huchberger v. Ins. Co.*, 4 Biss. 265.

The charge in this case may be fairly construed to mean, that in view of the serious charges of moral dereliction, they must be established clearly, and to the entire satisfaction of the jury, otherwise the presumption of innocence and proof of good character should prevail. Undoubtedly the litigant is entitled upon request, to have the jury instructed that the rule with respect to the quantum of proof in a criminal case is not to be applied in a civil case, although the issue and the proof involve a charge of crime. But if he asks for no such charge, and the charge made does not amount to the criminal rule, he has no right to complain.

We cannot say in this particular case that the charge is so erroneous as to require a reversal of the judgment. It will therefore be affirmed.

Judgment affirmed.

D'ARUSMENT v. JONES.

(4 Lea, 251.)

Jurisdiction — administration on estate of living person.

Administration on the estate of a living person is void.*

BILL to satisfy notes and deed of trust. The opinion states the facts. The complainant had judgment below.

W. M. Randolph, for complainant.

Humes & Poston, George Gillham, and Estes & Ellett, for defendants.

McFARLAND, J. The question in this case is the validity of an administration upon the estate of a living person.

The complainant files this bill to have satisfaction of four notes for \$1,000 each, executed to her by William C. Harrison on the 15th of January, 1861, and secured by a deed of trust on a tract of land in Shelby county, which she on that day had sold and conveyed to said Harrison. She states that soon after the date of said transaction she left the State of Tennessee, and resided for several years in the States of the North, and afterward in Europe, returning to this State shortly before the filing of this bill, April 25, 1874. Upon her return she discovered that during her absence, to wit, on the 10th of August, 1869, the defendant, David Whitly, had procured letters of administration upon her estate from the County Court of Shelby county, upon the pretext that she was dead, and as such administrator had filed a bill in the Chancery Court of said county, against the personal representative and devisee of said Harrison (who had died) and the heir of the trustee in the deed of trust (who had also died), to have satisfaction of said notes, alleging that they had been lost or mislaid.

The cause was compromised, and a decree rendered in favor of said Whitly for \$3,500, upon condition that he execute a bond with surety to indemnify the estate of said Harrison, or the devisees of said land, to the extent of said sum of \$3,500, against all claims

* To same effect, *Metta v. Simmons* (45 Wis. 334), 30 Am. Rep. 746, and note, 749; see *Roderigas v. East River Sav. Inst.* (76 N. Y. 316), 32 Am. Rep. 309.

that might be set up by complainant, if alive, or by any assignee of said note. The bond was executed and the money paid. The prayer of the bill is to have satisfaction of the notes out of the trust property, but that Whitly and his sureties be held liable upon his aforesaid bond to the extent of the penalty thereof, in exoneration of the land.

It is conceded that the material allegations of the bill have been established, but it is maintained that Whitly acted in good faith and with due caution upon the belief that complainant was in fact dead, a belief justified by the fact that she had been absent for more than seven years, and the most diligent inquiries among her friends and acquaintances could discover no trace of her, and it is insisted for the defendant that the administration of Whitly should be held so far valid as to constitute a protection to innocent parties who in good faith paid to him money due the complainant.

A similar case has never before arisen in this State, so far as we know. It is a question that has recently attracted some attention. Previous to the decision of the Court of Appeals of New York, in 1875, in the case of *Rodrigas v. East River Savings Institution*, 63 N. Y. 485; s. c., 20 Am. Rep. 555, it seems not to have been doubted that such an administration would be absolutely void. Chief Justice MARSHALL said, such an act "all will admit is totally void:" *Griffith v. Frazier*, 8 Cr. 9, and there are numerous dicta and several decisions to the same effect. *Binson v. Ivey*, 1 Yerg. 306; *Allen v. Dundas*, 3 T. R. 125; *Wilson v. Frazier*, 2 Humph. 30; *Jochumsen v. Savings Bank*, 3 Allen, 87; 2 Taylor on Ev., §§ 1490, 1523. The case in 63 N. Y., before referred to, raises the direct question. Administration had been granted upon the estate of one who had been absent and not heard from for more than seven years, and money collected from his debtor. It turned out that he was not in fact dead, and the question was whether the payment made by the debtor was a protection against a second demand. The judges were divided in opinion — four to three — the majority holding the payment a protection. The decision has been severely criticised by Judge Redfield in 15 Am. Law Reg. It is fair however to say that the opinions present that side of the question with all its force, and show that at least something may be said in its favor. The argument may be briefly stated thus. Upon proof of death, the surrogate was compelled to act and grant administration. Proof of seven years' absence without being heard from was *prima*

facie evidence of death, which the surrogate might be unable to rebut, and therefore he was compelled to act, and grant the letters of administration. Armed with these letters, the administrator could demand payment, and the debtor could not resist, and therefore it being a payment compelled by law, the debtor ought to be protected, especially as it is the act of the supposed decedent, in remaining absent without communicating with his friends for more than seven years, that causes the injury, and consequently he, rather than the debtor, ought to suffer.

The decision however was to some extent placed upon the statutes of New York, which were assumed to be peculiar in this respect, that is to say, before administration can be granted the fact of the person's dying intestate shall be proven to the satisfaction of the surrogate, who shall examine the person applying touching the time, place and manner of the death, and may examine any other persons, and for that purpose compel their attendance as witnesses.

While it is conceded, that in general the finding by the court of the fact upon which the jurisdiction depends is not conclusive of the jurisdiction, yet it is maintained, that as in this instance, the court was required to *hear evidence* and *determine* the facts, the determination must be conclusive until revoked, so far as concerns third persons, who had acted upon the faith thereof. It does not seem clear that an administration granted under such a statute would in this respect be different from administration granted under a statute simply authorizing the granting of administration upon the estates of deceased persons, but it is unnecessary in the present case to pursue this branch of the inquiry.

The force of the argument in favor of the validity of the administration seems to apply especially to a case of this character, when the assumption of death rests upon the fact of seven years' absence without being heard from, and the hardship of requiring a debtor who has recognized an administrator appointed under such circumstances liable to a second payment, seems peculiarly pointed. It must however be in principle immaterial what the proof of death may be as to the effect of the judgment; whether the court *find* or *assume* the fact of death upon proof of seven years' absence, or upon testimony of witnesses directly to the point, the question must be the same; that is to say, is the *finding* or *assumption* of the fact of death by the Probate Court conclusive until

revoked by the same court, or reversed on appeal, for we have no statute authorizing administration to be granted upon proof of seven years' absence without being heard from. It is simply a common-law rule of evidence, and it has no more force than any other evidence that may turn out to be untrue. Administration granted upon such evidence is no more lawful than if granted upon false testimony of witnesses. It may be the misfortune of the parties in interest in either case that for the time being they are unable to show the real truth. In such a case there is real hardship in requiring the debtor to pay the second time, but such is always the effect of holding, as courts are often compelled to do, that former judgments have been rendered without jurisdiction. The defendants in this case were unable to defeat the demand of Whitly, because they were unfortunately unable to prove the real truth. Such misfortune often occurs. The hardship to the debtor cannot be regarded greater than to hold the creditor bound by an administration of his estate in his life-time. To deprive him of his property and rights by a proceeding of this character, to which, by no sort of construction can he be regarded as a party, is a violation of first principles. It is said however that it is the fault of the supposed decedent in remaining absent for seven years without communicating with friends that gives rise to the presumption of death and causes the injury, and he ought therefore to be bound by his own act. The seven years' absence may be willful, or it may be the result of insanity, imprisonment or other misfortune. The failure of friends and acquaintances to be informed as to the residence of the absent one, or that he still lives, may be the result of accident or other cause. In what cases the conduct of a person in remaining absent and conniving at the acts of a pretended administrator should be held fraudulent and an estoppel, it is unnecessary to inquire, as such is not the present case. Whitly, to whom administration was granted as next of kin, turns out to be in nowise related to complainant, and she could not have anticipated such a proceeding or be held to have connived at it by remaining absent. A debtor in a case like the present could always obtain the indemnity which in this case was obtained, by applying to a Court of Chancery, that is, a bond of indemnity against the contingency of the creditor returning alive, an indemnity that perhaps ought to be provided by statute, and there could be no more hardship in requiring the debtor to look to such a bond for indemnity than in

requiring the creditor to do so. The money when thus paid should be recovered back either by the debtor who has paid it or by the creditor who returns alive, and if the security of the bond fail, it would be as great a hardship, to say the least of it, to require the creditor to lose it as to throw the loss upon the debtor. Therefore the question of hardship is out of the way, and the fact that the administration was granted upon the proof of seven years' absence forms no exception to the general rule, and we return to the simple question whether administration upon the estate of a living person is valid. Has a Probate Court under our statutes jurisdiction to grant administration otherwise than upon the estates of deceased persons?

Our statutes have not the supposed peculiarity of the statutes of New York. They simply authorize administration upon the estates of deceased persons, and if the person be not dead the court would be acting *ultra vires* to appoint an administrator. But it is said the Probate Court has jurisdiction to ascertain the fact of death, and its judgment finding that fact is conclusive until revoked or reversed. The general principle is that the jurisdiction being conceded, the judgment is conclusive of all matters involved, but if the jurisdiction be disproven, then the judgment is void for all purposes. If it be conceded that the jurisdiction rests upon the existence of a particular fact, then it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction, for this would be, to use a common expression, "reasoning in a circle." The judgment is conclusive if the court has jurisdiction, and its judgment that it had jurisdiction is conclusive of the jurisdiction. There may be, in some cases, confusion as to what constitutes the jurisdictional facts, but this would seem to be about as clear an illustration of it as could be found, that a Probate Court has assumed that a certain person is dead, and has granted administration upon his estate, when in fact he was not dead.

A similar illustration is given by Chief Justice MARSHALL. He says: "If by any means whatever a prize court should be induced to condemn as a prize of war a vessel which was never captured, it could not be contended that the condemnation operated as a change of property."

The proper distinction is illustrated in the case of *Allen v. Dundas*, 3 T. R. 125, where it was held that payment to one named as executor in a forged will, which had been presented and allowed in

the prerogative court, was a protection against the demand of one who had procured the proceedings on the forged will to be set aside and himself appointed administrator, this, upon the ground that the person being dead, the court had jurisdiction. But the judges said that if the person were not in fact dead the whole proceeding would be void. So that the jurisdiction rests upon the fact of death, and this being clearly shown untrue, it must result that the entire proceeding was without jurisdiction and void. For at least it sounds almost absurd to say that any man is to be bound by the judgment of a Probate Court that he is dead. The argument that the court has jurisdiction to ascertain the fact of death is fallacious, for this must assume that the court may decide the question either way, and if it concludes that the person is not dead, then it has no jurisdiction for any purpose. While the court may hear evidence of the death, the fact is generally assumed, and if the court undertake to put its finding of the fact in the form of a judgment, it gives it no greater validity. This conclusion is sustained by the great weight of authority. The direct question was fully considered, in a case precisely similar, by the Supreme Court of Massachusetts, and this view held by the unanimous opinion of the court. See *Jochumsen v. Savings Bank*, 3 Allen, 87.

The principle is directly involved in the case of *Thompson v. Whilman*, 18 Wall. 457. By the laws of New Jersey it was made unlawful for any one not at the time a resident or inhabitant of the State, to gather clams, oysters or shell fish in the waters of that State, and the law authorizes the seizure of the vessel and its forfeiture, which may be declared by any two justices of the peace of the county in which the seizure occurred. The suit was in the United States court against the sheriff who had carried away the vessel. The defense was the judgment of condemnation of two justices of the peace of New Jersey, which judgment recites the fact that the vessel had been seized in their county. This was held not conclusive, and it being shown the seizure was not in the county, the judgment of condemnation was held void.

Our own case of *Wilson v. Frazier*, 2 Humph. 30, was where administration was granted in two different counties about the same time. Judge REESE said, "the letters granted in the county other than the county of the intestate's residence were void."

Other similar cases are referred to in the case of *Jochumsen v. Savings Bank*, 3 Allen, 87. If the judgment of the Probate Court

as to the residence of the intestate is free from a collateral attack, it can hardly be said that the judgment of the court as to the death of the party can stand upon a higher ground. In fact, so far as our researches have gone, the case of *Rodrigas v. East River Savings Institution* stands alone, and even that decision seems to have been rendered doubtful upon a second hearing of the case. See 19 Am. Law Journal.*

As a further argument against the validity of the administration, we need only see to what it would lead. If the administration was valid until revocation, as argued in the present case, then it must result that the decree of the Chancery Court in the bill filed by Whitly to collect these notes was likewise conclusive, for in that view it was a bill filed by one who was, for the time being, properly authorized to act as administrator to collect assets due the estate. The proper defendants were made, and the court had jurisdiction of the subject-matter, and the decree rendered in the cause must, in that view, be held conclusive upon all parties. But suppose the decree had been in favor of the defendants in the cause, that no such note had ever been executed, or that they had been paid; would the complainants in this cause be bound by the adjudication? Is it possible that she could thus lose her property and rights by a proceeding to which she was in no sense a party? The decree was in fact for only part of the debt.

Without attempting to further follow the discussion into refinements, it is sufficient to say that it will at least bring us back to the plain common-sense view of the question, to which we think there is no sufficient answer, and that is, that there is no law for administering upon one's estate until after he is dead, and that no living man is bound by the *adjudication* of a court that he is dead. It might be different if we had a statute such as exists in Rhode Island, or such as the New York court seems to have construed theirs to be, providing that after an absence for a given time one's estate may be administered upon as if he were dead, subject only to his right to reclaim the proceeds, in the event he return. Even then it would be a question whether this would not be depriving a man of his property without due process of law. See Albany Law Journal of May 15, 1880, p. 383. But at any rate, we have no such statute.

We hold the entire proceedings void. We also hold Whitly and

* See 76 N. Y. 316; 32 Am. Rep. 309.

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his sureties on his bond of indemnity liable, to the extent of the penalty for the money received by him. The amount thus realized will be paid to complainant in exoneration to that extent of the trust property. 1 Lea, 586. It appears that some of the persons to whom Whitly distributed the funds have voluntarily paid the complainant part of the amount. An account of this, as ordered by the chancellor, will be taken, and the amount credited on the decree on the indemnity bond. Under the circumstances, we disallow interest during the war, and until June 1st, 1865, in accordance with our holding in similar cases, upon the ground that the parties were, for the time being, separated by the lines of the hostile armies, and occupied toward each other the relation of public enemies, between whom commercial intercourse was forbidden.

With this modification, the decree of the chancellor will be affirmed, and the cause remanded, and the cost of this court divided.

Upon petition to rehear, McFARLAND, J., said: We have been asked to rehear this case on account of its novelty. The only additional argument offered is a review of the question in the American Law Review, of May, 1880. This article concedes that the weight of authority is in favor of our conclusion, and refers to additional authorities in its support that we have not had access to. *Moore v. Smith*, 11 Rich. 569; *Melia v. Simmons*, 45 Wis. 334; s. c., 30 Am. Rep. 746. The author only undertakes to say that something may be said on the other side of the question, and puts forth, somewhat doubtingly, the suggestion that the jurisdiction does not depend upon the fact of death, but upon the allegation of the fact in the application for letters of administration.

If disposed to enter further with the discussion, we think it could be shown that this position is unsound. But we are content to rest our conclusions upon the reasons and authority already given.

The other points in the petition have been fully considered in the foregoing opinion.

As to the interest after June, 1865, while it is true that complainant was absent with the notes in her possession, so that they could not have been paid, yet it is not shown that the defendants were ready or desired to make payment, or that they lost the interest.

Petition to rehear dismissed.

FREEMAN, J., dissented.

SINGER MANUFACTURING COMPANY V. COLE.

(4 Lea, 489.)

Sale — sewing machine on rental.

A contract to "rent" a sewing-machine, for a certain whole sum payable at the expiration of fifteen months, with interest after maturity, the title to the machine until payment to remain in the lessor, and the lessor to have the right of retaking on default of payment, is a sale, and is valid. (*See note, p. 21.*)

ACTION on contract. The opinion states the case.

McDearmon & Tyree, for company.

H. T. Johnson, for Cole.

FREEMAN, J. This suit is brought on the following contract :

"Rent note. No salesman allowed to make any contract other than is printed or written on this note. Fifteen months after date, for value received, I promise to pay to the order of the Singer Manufacturing Company ninety-five dollars, for the rent of their sewing machine, with interest at ten per cent after maturity, and payable at Pickettsville, Tennessee.

"It is agreed and understood between the makers, indorsers and payee of this note, that the Singer sewing machine number (giving it), for the use of which to the maturity of this note is given, is, and shall remain, the property of the Singer Manufacturing Company, and in default of payment, the said machine shall be returned to them or their agent in good order, and they or their agent are authorized to take possession of the same without process of law. On payment of this and all other notes (given for the use of this machine) a bill of sale will be given, and title to same passed to the lessee ; but until then, the title to the machine shall remain in the Singer Sewing Machine Company.

" L. A. SENTER.

" M. A. SENTER."

The facts shown in the record are that L. A. Senter, an unmarried lady, purchased or bargained for the machine, which was

delivered to her at the time of the execution of this instrument. She has since intermarried with defendant, W. P. Cole.

The Circuit judge charged the jury, following, we assume, a case from Minnesota, *Domestic Sewing Machine Company v. Anderson*, 23 Minn. 57, that in case of a sale and delivery of personal property, an agreement by the purchaser to pay the vendor for the future use of the same, or to deliver it up to him on demand, is repugnant to the contract of sale, and is void. The receipt of the property by the purchaser furnishes no valid consideration for such an agreement. The idea that underlies his honor's view of the case is, that there was first a purchase, and then a renting of the machine purchased, and such seems to be the view of the Minnesota court.

This is not the fair construction of the contract, when we place ourselves in the situation of the parties, and take in all the circumstances of the case, as we may do to ascertain the meaning of the writing. It is true it is called a renting of the machine, but this is not the fact, nor true construction of the transaction. It was a sale of the machine, with a reservation of the title to the company, as security for payment of the price. The fact that it is called a renting does not make it so. In order to make it a renting of a purchased machine, we must say it was sold for nothing, and then rented to the purchaser by the vendor for fifteen months for ninety-five dollars, this being the only sum ever agreed to be paid. This would be absurd. However reprehensible and calculated to excite suspicion of unfairness this contract may appear, with its verbiage expressing literally a different meaning from what was intended, or was the truth of the case, we do not think proper to follow the technical view of the opinion referred to, and hold the contract void. The party has undertaken to pay ninety-five dollars, in terms for rent, but in fact for the purchase of the machine, and is bound, as we can see from this record, to meet the obligation contracted.

Without further discussion, let the judgment be reversed, and the case be remanded for a new trial.

NOTE BY THE REPORTER.—In *Domestic Sewing Machine Co. v. Anderson*, *supra*, a receipt was executed for the machine, "to be returned on demand," and until then to pay so much down and so much monthly for its use. A previous oral agreement of purchase and sale was proved. The court said:

"The evidence thus introduced tended to show an absolute sale and a delivery of the machine and other articles by the plaintiff to the defendant, and such sale and delivery were accordingly found by the court below to have been made. The absolute sale and delivery of course invested the defendant with the absolute and general ownership and

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property of the machine and other articles. The instrument above recited was therefore not only repugnant to the contract of absolute sale, and therefore void, but was, so far as appears, without consideration. The receipt of one's own property from a person having no right to the possession of it cannot be a valid consideration for an agreement to pay for the future use of the property, or to deliver it up to such person upon demand. See *Cole v. Berry*, 13 Vroom, 308; s. c., 36 Am. Rep. 511; *Singer Mfg. Co. v. Graham*, 8 Oreg. 17; s. c., 34 Am. Rep. 572, and references."

In *Hine v. Roberts*, 48 Conn. 267, an organ was delivered on a written agreement for a specified "rent," part of which was paid in a melodeon delivered by the vendee, and part in a note executed by him, payable in about two years, "with the understanding that if I shall have punctually paid all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ." The organ was returned, and it was held that no action could be maintained by the vendor on the note. The court said: "The transaction was not, except in a limited and materially qualified sense, a lease; that is, if the contemplated sale was not completed by the payment of the note, it would operate as a lease of the organ until the note became due. But that was not the ultimate aim and object of the parties; it was simply contemplated and provided for as a possibility. The real purpose was to sell the organ, with an agreement that the seller should not part with the title until the purchase-money was paid. A careful inspection of the instrument shows that this must be so. It is not in the form and does not contain the usual stipulations of a lease. It is not signed by the lessor, and expresses but one agreement to be performed by him, and that is to give a bill of sale if the note is paid at maturity. Erase the words 'rented' and 'rent' from the instrument wherever they occur, and substitute the word 'money' or its equivalent wherever necessary to complete the sense, and the instrument expresses the exact idea which the parties had in mind, and there is not left in it a single element of a lease except as above stated. We read the transaction therefore as a conditional sale; and so the plaintiff's counsel regarded it when the request was framed asking the court to charge the jury that such sales are recognized and upheld by our law. The question then arises — what was the nature of that condition? The plaintiff seems to treat it as a conditional sale by him but as an absolute purchase by the defendant; and the court seems to have sanctioned that view. We think that view does not give effect to the real intention of the parties. It cannot be denied that the plaintiff had a right to prescribe the terms on which he would part with his property, and we think he has done so. For while the language of the instrument purports to be the language of the defendant, it is in reality the language of the plaintiff. The instrument is a printed blank, carefully prepared by the plaintiff and extensively used in his business. It was filled out by the plaintiff's agent and the defendant was required to sign it. Presumptively he would not have been permitted to sign any other, for that was evidently the mode and form in which the plaintiff transacted business. The plaintiff said to the defendant, in substance, 'I will sell the organ to you for \$190. I will accept your melodeon in part payment at \$50, and your note for \$140 payable at the end of one year. If you pay the note promptly when due the organ is yours. If you do not, you forfeit all your rights under the contract, and both the organ and melodeon are mine.' We believe this to be a fair statement of the material part of the contract. If the note is not paid the payment of \$50 is forfeited by express agreement. As that is something more than twenty-five per cent of the whole price of the organ it would seem to be ample compensation for its use during the year. The plaintiff now insists that the defendant shall not only forfeit the melodeon but shall also pay the note. He virtually injects into the contract, in case of failure to pay the note, this further provision — "And the said Hine shall be at liberty to sue for and collect the note." We do not think

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that is a fair interpretation of the contract. We do not think that the defendant so understood it, or that he would have signed it if it had been so expressed. We think that the defendant understood that it was at his option to pay or not to pay the note. The consequences of payment or non-payment were expressly provided for, and nothing is left to implication. The contract is adroitly framed so as to induce that belief, and it is our duty to interpret it in the sense in which the defendant would naturally understand it, especially if the plaintiff knew or had reason to believe that the defendant so understood it."

COCKE v. HOFFMAN.

(5 Lea, 105.)

Limitation — payment after bar by co-surety — contribution.

A surety who pays the debt after it is barred by the statute of limitation can not compel his co-surety to contribute.*

ACTION for contribution. The opinion states the case. The defendant had judgment below.

McDermott & Kyle, for Cocke.

W. H. Watterson and *J. B. Heiskell*, for Hoffman.

COOPER, J. Jesse M. Lyons, the intestate of the plaintiff in error, commenced this action, January 29, 1867, against James Hoffman, before a justice of the peace, to recover contribution from him as a co-surety for money paid in discharge of the common debt. The justice rendered judgment for the defendant, and upon appeal, the Circuit judge, who tried the case without a jury, rendered a similar judgment. The plaintiff appealed in error.

Lyons and Hoffman were sureties for James Richards on a note dated December, 14, 1862, and payable one day after date to Wm. Lyons, for one hundred dollars. Jesse M. Lyons paid this note on the 20th of January, 1873, after the bar of the statute of limitations had run in his favor. On the trial, these facts were proved by the administrator of Wm. Lyons, the money having been paid to him. The witness also proved that Richards, the principal, was, and always had been, insolvent. He further testified: "I had several conversations with Jesse M. Lyons about the note, in which he

* See *Bergoon v. Bitler* (55 Md. 384), 39 Am. Rep. 417, and note, 418.

promised to pay it, and I held him bound by the promise, and he settled it as I before stated." The witness added that Hoffman was not present at any of the conversations between witness and Jesse M. Lyons.

The right of a surety to recover contribution from a co-surety, the principal being insolvent, is, as a general proposition, clear. *Cage v. Foster*, 5 Yerg. 261; 26 Am. Dec. 265. The relation of the parties and the rights incident to that relation originate with the execution of the instrument of suretyship, while the right to contribution arises at law from the payment of the money. The statute of limitations begins to run from such payment beyond the ratable share of the surety making the payment. *Reeves v. Pulliam*, 7 Baxt. 119. These propositions are plain enough, and it is equally plain that the payment of an obligation which has ceased to be binding upon any of the obligors would give no right of action for contribution. The obligation, the authorities say, must be valid and subsisting, or as it is otherwise expressed, fixed and legal, and the payment compulsory. 1 Pars. on Cont. 32; Brandt on Suretyship, § 232; 2 Dan. Neg. Inst. 1341. But the obligation of a debt, the remedy on which is barred by the statute of limitations, cannot be said to be subsisting and legal, and its payment compulsory on a party in whose favor the bar has attached. He may successfully resist the obligation and decline the payment. And to use the language of an eminent judge, "it is idle to talk of a debt where there is no legal obligation to pay it." Per BRONSON, J., in *Van Keuren v. Parmelee*, 2 Comst. 523.

It is said however that this court has decided that a surety who has paid the debt may recover against the estate of his principal, or against the estate of a co-surety for contribution, although the personal representative of the principal or surety, as the case may be, may have already been protected by the statute of limitations from a direct suit by the creditor. *Marshall v. Hudson*, 9 Yerg. 57; *Mazey v. Carter*, 10 id. 521; *Reeves v. Pulliam*, 7 Baxt. 119. It is further said that this court has held that a surety who has paid the debt may have contribution from a co-surety, although the latter had, prior to the payment by the surety, been discharged in bankruptcy from liability on the contract. *Goss v. Gibson*, 8 Humph. 197. It is hence argued that the decisions in this State are not in accord with the general rules above mentioned in regard to the legal and subsisting nature of the obligation, and compul-

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sory character of payment required to create the right of action for contribution.

Whether the decision was correct in the bankruptcy case may admit of doubt, for the reason that the relation of suretyship between the parties was terminated by the discharge before payment. *Tobias v. Rogers*, 13 N. Y. 59; 1 Smith Lead. Cas. 1250 (7 Am. ed.); *Eberhart v. Wood*, 2 Tenn. Ch. 488. Both classes of cases proceed, however upon the same ground, viz. : that the statute and the discharge in bankruptcy only operate on the remedy, and do not extinguish the debt. The debt is revived in each class of cases by the same character of promise, and the action lies on the original demand. *Hunter v. Starkes*, 8 Humph. 656; *Taylor v. Nixon*, 4 Sneed, 353. After some uncertainty in the language of our judges, the law may be considered as so settled in this State. *Woodlie v. Twiles*, 1 1 Memph. L. J. 68, 179; s. c., 1 Leg. R. 331; *Partee v. Badget*, 4 Yerg. 174; 26 Am Dec. 220; *Hannah v. Hawkins*, MS., at this term. In this view, the statute, in the one class of cases, and the discharge in bankruptcy only bar the remedy, without impairing the obligation, and the defense being personal only, protect the party entitled to its benefit. *Armstrong v. Croft*, 3 Lea, 191; *Davis v. Davis*, MS., at this term. The obligation is left in full force as against all other parties to the contract, and of course, if such other parties are compelled to pay the debt, while it is legal, subsisting and compulsory as to them, their rights growing out of such compulsory payment remain in full force. But it has never been held that if one of such parties pays the debt after it has ceased to be legal, subsisting and compulsory, as where he is himself protected by the statute of limitations or by a discharge in bankruptcy, he could recover against a co-surety.

On the contrary, our decisions from an early day tended in a different direction. This court held, contrary to the then current of authority, that even a partner could not revive a partnership debt by a new promise, made after the dissolution of the partnership, so as to bind his co-partner, whether the new promise was made before or after the bar of the statute had attached. *Muse v. Donelson*, 2 Humph. 166; *Belote v. Wynne*, 7 Yerg. 534. These cases, it is true, only involved the right of the creditor to hold one partner liable on the promise of the other partner. But it would have been idle to have protected the former from the creditor, if he could be held liable for the same debt to the co-partner. The want

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of power in the case of partners after dissolution is rested on the cessation of the agency growing out of the partnership. But all co-debtors are precisely in the situation of partners after a dissolution of the firm who are bound for a partnership debt. Neither debtor has a right to bind the other beyond the obligation of the original contract. When that obligation is terminated, either by the extinguishment of the debt or the remedy, neither can create a new obligation which will bind the other either to the creditor or himself. The very fact that he cannot renew the obligation for the benefit of the creditor, demonstrates that he cannot renew it for himself; for it would be to say he might do indirectly what he could not do directly.

In this State, as now generally, the statute of limitations is looked upon with favor, as a statute of repose. A valid, subsisting obligation may be said to consist of a legal debt or duty, and the remedy to enforce it. *Carshore v. Huyck*, 6 Barb. 583. Whether the statute operates to extinguish the debt or the remedy, the result is the same. There is no longer a valid, subsisting obligation, and its payment is not compulsory. The moral obligation can only bind the individual. Such obligations belong to the forum of conscience. The courts can enforce only legal rights.

There is no error in the judgment of the Circuit Court, and it must be affirmed.

Judgment affirmed.

HOLBERT V. EDENS.

(5 Lea, 204.)

Water and water-course — contract for sale of land — boundary on stream.

On a contract for a sale, at a fixed price per acre, of land bounded on the side of a river, and following the meanderings of the river, the river being navigable only for flatboats and rafts at high water, the vendee is bound to pay only for the land extending to low-water mark and the islands between that and the center of the stream, and not for the land under ordinary water.*

BILL to enforce vendor's lien. The opinion states the case.

* See *Low v. Tibbetts* (72 Me. 92), 49 Am. Rep. 303, and note 305.

Holbert v. Edens.

F. M. Falkerson and *A. S. Prosser*, for complainants.

McDermott & Kyle, for defendants.

COOPER, J. Bill filed, among other things, to enforce a vendor's lien on land for the unpaid purchase-money. The land lies in a bend of Powell's river. The chancellor rendered a decree enforcing the vendor's lien, but refused to charge the vendee with interest on the deferred payment of the purchase-money, or to charge him with the price of the land covered by the river *ad filum aquæ*. The sale was made on the 23d of February, 1860, and the bill was filed on the 19th of February, 1876. The sale was by bond for title in these words:

"We, Pleasant Tankesley and John Boulton, bind ourselves to pay William Edens in the sum of \$1,100; the conditions of this obligation is such, that whereas the said William Edens has this day purchased of us, for the consideration of seven dollars per acre, in the following payments, to-wit: the said Edens pays to the said Tankesley and Boulton \$300 in hand, and the remainder, if any, to be paid three years from this date, a certain tract of land, in the State of Tennessee, Hancock county, district 14, containing eighty acres, be the same more or less, known as the Tankesley land, on the south side of Powell's river, and bounded as follows, to-wit: Beginning at an elm and beech on the south side of Powell's river, then down the river as it meanders to Wm. Harrold's line, thence north-east direction with Harrold's line to the river, thence down the river as it meanders to the beginning, so as to include all the land the said Tankesley and Boulton own in the bend of said river. Now if we should make, or cause to be made to the said William Edens, his heirs or assigns, a good warranty deed to the said tract of land on making of the last payment, then this obligation to be void, otherwise to remain in full force and effect. The said Edens to have possession of said land at any time he wants it."

Edens went into possession of the land at the date of his purchase, and has remained in the uninterrupted possession thereof ever since. He paid the cash payment of \$300, and has never paid the deferred payment. No survey of the land seems to have been made until after this bill was filed. It was then found that the quantity of land contained in the boundaries of the title bond, if the bank of the river was followed, amounted to seventy-eight acres; if the boundary line followed the *filum aquæ* of the river, the tract con-

tained eighty-four acres. It was agreed by the parties that Powell's river is a small river, unsuited for the navigation of steamboats or sea vessels, and was never used for such purpose; but that the same is navigable for floating flatboats and rafts down stream during freshets and high water, though not during an ordinary stage of water. During the summer and fall months the stream can rarely ever be used for flatboating or rafting, but during the winter and spring months there are frequent tides sufficient for such purposes, as is usual in the rivers of East Tennessee. The proof shows that there are four islands in the river that will be included in the boundaries of the tract sold if the line extends to the middle of the stream. One of these islands is large, the others small, and the river does not run around the largest island at all seasons of the year. The small islands are not susceptible of cultivation and have no timber on them. There are some elms and sycamore trees on the largest island, but says the only witness who speaks of these islands, "I would not fence the largest island and cultivate it for what I could make on it."

Upon the foregoing facts the first point raised and argued is, whether the vendee is liable to pay on the land which would be included in the river boundary running with the center of the stream, or only for the quantity obtained by drawing in the line to low-water mark. The point is one of first impression in this State and upon which there is grave doubt.

If a water-course be navigable in a legal sense the soil covered by the water as well as the use of the stream belongs to the public. If it be navigable only in the ordinary sense the ownership of the bed of the stream is in the riparian proprietors, and the public have an easement therein for purposes of transportation and commercial intercourse. If the stream be so shallow as to be unfit for such purposes of transportation and commerce, both the right of property and use are in the owners of the adjoining land. A stream is navigable in a legal sense when it is capable in the ordinary stage of the water of being navigated, both ascending and descending, by such vessels as are usually employed for purposes of commerce. A river not navigable in a legal sense may yet be navigable in the common acceptation of the term, as where in certain stages of the water it may have sufficient depth for flatboats, rafts, or small vessels of light draft. *Elder v. Burrus*, 6 Humph. 358; *Stuart v. Clark*, 2 Swan, 10; *Sigler v. State*, 7 Baxt. 493. The agreed state of facts

in this case shows that Powell's river is not navigable in a legal sense, but is navigable in the common acceptation of the term. The ownership of the bed of the stream is therefore in the riparian proprietors.

There is some uncertainty both in the language of the courts and of the text writers as to whether this ownership is a mere incident to the title to the banks of the stream, or depends upon sufficient language being used in the grant, under which the owner holds, to pass the title to the soil under the water. Sir Matthew Hale, in his famous tract *De Jure Maris et Brachiorum ejusdem*,* from which all our common-law learning on this subject is deduced, says: "Fresh rivers of what kind soever do, of common right, belong to the owners of the soil adjacent, so that the owners of the one side have a common right, the propriety of the soil and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side the right of soil or ownership, and fishing unto the *filum aquæ* on their side. And if a man be the owner on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." Harg. Law Tracts; 6 Cow. 537, note. The plain meaning of this language is that the ownership of the soil under the river attaches "of common right," that is by law, to the ownership of the adjacent banks. And so are the decisions. *Carter v. Marcot*, 4 Burr. 2164; 2 Mod. 510; Dav. 152; *Ex parte Jennings*, 6 Cow. 518. In this last case the grant from the State bounded the land on the margin of the stream, yet it was held to extend "by construction of law" to the center of the stream.

In this view the important matter in a grant is to use such language as carries the banks of the stream, the ownership of the soil under the river following as an incident. Nevertheless there are in the books some nice distinctions which seem to depend on the terms of the instrument of conveyance, where the ownership of the bed of the river is sometimes held to pass and sometimes not to pass, although the banks of the river be conveyed. If the intention to be gathered from the whole instrument is to make the stream the boundary of the land conveyed, the line runs to the thread of the stream. If on the other hand "the bank, side, margin or shore" of the stream be used in such way as to show an intention to exclude the stream,

* See 16 Am. Rep. 51.

it becomes a monument and the soil under the water will not pass, even in cases where the boundary is carried to the line of low water mark. *Dunlap v. Stetson*, 4 Mason, 349; *Child v. Starr*, 4 Hill, 369; *Bradford v. Cresssey*, 45 Me. 9; *Daniels v. Cheshire R. Co.*, 20 N. H. 85; *Halsey v. McCormick*, 3 Kern. 296; *McCulloch v. Aten*, 2 Ohio, 399. The general rule undoubtedly is that a call for the stream or bank, or object on the bank, and then with the stream according to its meanders, will carry the boundary *ad filum aquæ*, whether the grant be by the State or a private individual. 3 Wash. Real Prop., 353 (3d ed). And our decisions are in accord. *Mas-sengill v. Boyle*, 4 Humph. 205; *Martin v. Nance*, 3 Head, 649; *Elder v. Burrus*, 6 Humph. 358; *Stuart v. Clark*, 2 Swan, 10; *Branham v. Turnpike Co.*, 1 Lea, 706.

The actual call in these cases is for or with the stream, not for or with the center of the stream. The question has not been discussed whether the center of the stream is reached "by construction of law," from the fact that the adjacent banks pass or by force of the call. Nor has the point now before us, the liability of the vendee to pay for the soil between low-water mark and the thread of the stream, been considered and adjudged. The point was raised in *Elder v. Burrus*, 6 Humph. 358. There the land, bounded on the Cumberland river, was sold as containing a given number of acres, the vendor agreeing to refund the purchase-money for any deficit in the quantity at a fixed price per acre. The vendee sued upon the agreement, alleging a deficit. The last call of the grant was, "up the Cumberland river with its meanders." If the line followed ordinary low-water mark, there was a deficit; if the center of the stream, there was no deficit. The court held that Cumberland river being navigable in a legal sense, the line ran with ordinary low-water mark. It seems however to have been taken for granted that if the line had been the center of the stream, the vendee would have had no right of action.

It is almost certain however that when a sale is made of land by the acre, at a fixed price per acre, bounded on a navigable stream in the ordinary acceptation of that term, the parties do not contemplate that the vendee is to pay for the land between ordinary low-water mark and the center of the stream, and actually covered by the water. The right of the public to an easement in the stream may well be held to take so much of the tract out of the estimate, unless the contract expressly calls for the center of the

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stream. We think it a safe rule to adopt in all such cases that the vendee intends to convey to ordinary low-water mark, and that the propriety of the soil under the water, "by construction of law," or to use the words of Sir MATTHEW HALE, "of common right," *usque filum aquæ*, goes with the ownership of the adjacent banks. If there are islands in that part of the stream which would pass by operation of law, they ought to be estimated in ascertaining the quantity of land to be paid for. In this case the respective sizes of the islands do not appear, while the only witness examined speaks of them as of no value. They are probably mere sand bars of no great extent, and not worth the cost of a re-survey at the price fixed by the contract.

[Omitting a minor inquiry.]

The chancellor's decree will be modified in accordance with this opinion, and the defendant will pay the costs of this court.

Judgment accordingly.

COFFMAN V. LOOKOUT BANK.

(3 Lea, 222.)

Fraud — undue influence in obtaining contract.

A son, of age, forged the names of his father and uncle and a third person on a note. Several officers of the bank, which discounted it, one of whom was a lawyer, in a private and prolonged interview with the father, who was a farmer and little acquainted with business, informed him of the forgery. He was greatly unnerved by the discovery of his son's crime, and had no opportunity to take legal or friendly counsel. At this interview these officers persuaded him to execute his own note for the forged note, and requested him to keep the transaction secret. The note so executed was for a larger sum than the maker's entire property would have brought at forced sale. *Held*, that such note must be cancelled in equity.

BILL to enjoin the prosecution at law of a promissory note and for the cancellation of the note. The opinion states the facts. The bill was dismissed below.

Theo. Rogan, for complainant.

J. C. Hodges, for defendant.

COOPER, J. Bill to enjoin the prosecution of a suit at law upon a note, and to set aside the note on the ground of surprise. The chancellor dismissed the bill, and the complainant appealed.

The complainant is a farmer, with a wife and six children, two girls and four boys, five of them under age. He owns land worth about \$1,300, and a few hundred dollars of personalty. He is a man who has lived a retired life, attending exclusively to the business of his farm, and never mingling with the world in a public capacity. His oldest son was about twenty-two years of age when the note in controversy was executed. He had developed a disposition to recklessness and improvidence. In June, 1876, this son applied to the defendant, the Lookout Bank of Morristown, to borrow money, and the bank discounted for him a note of \$35 at sixty days, purporting to be indorsed by his father, his uncle and a third person. A few days afterward the son again applied to the bank to discount a note for \$900, with the same indorsers, dated June 21, 1876, at sixty days, which was done. On the next day the bank, at the instance of the young man, again discounted a similar note for \$900, with the same indorsers, having the same time to run. The officers of the bank seem not to have been acquainted with the young man or his antecedents, nor with the handwriting of any of the indorsers. Young Coffman had represented that he was, in connection with the indorsers, about to purchase wheat from certain persons, and it was the discovery incidentally, within a few days, by one of the officers of the bank that he had not bought any wheat from a certain party named, that the bank began to suspect the genuineness of the paper discounted. In reality, the names of the indorsers were forged. The principal officer and owner of the bank then saw the uncle of young Coffman, whose name had been used as an indorser on the notes, and who was a justice of the peace, and mentioned to him the discount of the small note, saying nothing about the larger notes. The uncle said to the bank officer that if his name was on the note it was a forgery, and asked to see the note. The bank declined to show it, and requested him to see his brother, the complainant, and ask him to call at the bank. He did see his brother, and having no doubt that the note was a forgery, and supposing that it was the only note discounted by the bank, advised his brother to pay it. Complainant borrowed the money, and went to the bank and proposed to take up the note. The cashier of the bank took complainant into a private room in the rear of the bank, telling him that if the

small note was all it would be a matter of little consequence. He declined to make any explanation until he had gone after one of the directors of the bank, a principal stockholder and a lawyer. When the three were brought together in the closed room, the two notes for \$900 each were shown to complainant and the business explained to him. As might naturally be expected, the complainant was literally overwhelmed by the calamity, "greatly moved and distressed," say the bank officers, and wept bitterly. The hour of the day at which the interview occurred and the length of the interview are left in some uncertainty. The owner and director of the bank, who was also a lawyer, and who gives the most connected narrative, says that this interview took place at two o'clock in the afternoon, and it probably lasted from one to two hours. The result of it, was that complainant paid and took up the small note, and gave to the bank his note, written by the cashier of the bank, of that date, July 5, 1876, at one day, for \$1,742.50, with ten per cent interest after maturity, payable quarterly. Before complainant left the room the cashier suggested to him that he wash his face to remove the traces of recent weeping, and it was agreed that the matter should be kept secret. One of the \$900 notes was delivered up to complainant upon the execution of his note, and the other it was agreed should be surrendered when returned to the bank, it having been sent to Knoxville with a view to be used if the maker of it could be there found.

The complainant himself testifies that during this interview, owing to the suddenness of the communication and the nature of calamity, he was incapacitated from entering into any contract with full knowledge of its scope. The other persons present admit the distress and agitation of the complainant, but say he afterward became calm, and proposed and entered into the contract with full possession of his faculties.

The proof of his brother and his neighbors is that he was thoroughly unnerved by the calamity, "almost in a state of mental aberration," to use the language of a neighbor and a physician, and "well nigh crazy," to use the words of other witnesses. In a few days he sent back the \$900 note he had received, and demanded his note. The other \$900 note was sent to him by the bank on the 11th of July, and on the next day both of these notes were delivered to one of the officers of the bank, who received them he says, to be used against the son who had been arrested. Shortly

afterward the complainant was sued at law upon his note, and subsequently, on April 17, 1877, filed his bill. Owing to the absence of his lawyer, complainant seems not to have taken legal advice until eight days after the execution of his note.

The principle of equity jurisdiction on which this bill rests is thus stated by Judge STORY : "Cases of surprise and sudden action without due deliberation may properly be referred to the same head of fraud or imposition. An undue advantage is taken of the party under circumstances which mislead, confuse or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate or the cunning. It has been very justly remarked by an eminent writer that it is not every surprise which will avoid a deed duly made. Nor is it fitting, for it would occasion great uncertainty, and it would be impossible to fix what is meant by surprise; for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be. The surprise here intended must be accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him. If proper time is not allowed to the party and he acts improvidently, if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences, but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there has been great inequality in the bargain, courts of equity will assist the party upon the ground of fraud, imposition or unconscionable advantage." 1 Story Eq. Jur., § 251.

When a court of equity relieves on the ground of surprise, it does so because something has been done which was unexpected, and operated to mislead or confuse the party on the sudden, and on that account has been deemed a fraud. *Earl of Bath and Montague's case*, 3 Ch. Cas. 56, 74, 114; *Evans v. Llewellyn*, 2 Bro. C. C. 150. The mere fact that a transaction has been improvident and precipitate and entered into without independent professional advice, will not vitiate it, if the parties were on equal terms, in a situation to act for themselves, and fully understood what was done. If the parties were not on equal terms, and one of them, from ignorance, agita-

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tion or undue importunity, is unable to protect himself, equity will protect him. *Kerr on Fraud*, 143; 1 Story Eq. Jur., § 222. The absence of professional advice is, in such cases, a material circumstance, especially if the other contracting party has such aid. *Kempson v. Ashbee*, L. R., 10 Ch. App. 19; *Baker v. Bradley*, 7 DeG. M. & G. 621. The English courts have said that a contract made with full legal advice on the one side and none on the other; will rarely stand the test of judicial scrutiny. *Clarkson v. Hanway*, 2 P. W. 205; *Murray v. Palmer*, 2 Sch. & Lef. 474. And see *Connelly v. Fisher*, 2 Tenn. Ch. 382.

Beyond all question the complainant was in no condition of mind, in the brief interview between him and the bank officers on the occasion when the note in controversy was given, under the terrific domestic calamity suddenly sprung upon him, to act freely and intelligently. Without imputing any improper motives to the bank officers, it is obvious that the course taken by them led to that surprise which was unexpected, and operated to mislead and confuse the complainant, and must, in view of the condition of his mind and the absence of friends, be held to amount to legal fraud. A father, overwhelmed by the information that his eldest son had been guilty of forgery, upon the spur of the moment, and doubtless in the vain hope on his part of saving the family honor, executes a note for a larger sum of money than his entire property would bring at forced sale. His state of mind afterward, as shown by the weight of testimony, whatever the bank officers may have thought on the subject, was not such as to justify a ratification until he had taken legal advice. He refused, when again sent for by the bank officers to modify the contract by an extension of time and giving security, to entertain the proposition. The bank on this occasion seems to have been represented by two lawyers, who were also directors, while the complainant was without legal advice. He and the officers of the bank differ as to the details of the interview. But nothing that passed, and certainly nothing that was done, could affect the legal status of the parties, in view of the continued mental condition of the complainant and the absence of legal advice. There was nothing which amounted to a legal ratification of the previous act.

The chancellor's decree will be reversed, and a decree rendered in favor of complainant, and the defendant will pay the cost of this suit and of the suit at law.

Decree reversed.

WAGONER v. STATE.

(5 Lea, 332.)

Criminal law — rape — infant — presumption.

The presumption that a boy under fourteen cannot commit rape may be rebutted by proof of the actual commission.

CONVICTION of rape. The opinion states the case.

W. F. Yardley, for Wagoner.

Attorney-General Lea, for State.

DEADERICK, C. J. This is a conviction of rape, perpetrated upon a girl about twelve years old by a boy, whose age, according to the evidence in the record, does not exceed fourteen or fifteen years, and by his father's evidence, is less than fourteen years. The common-law rule is that the law presumes a boy under fourteen years cannot be guilty of this crime. 2 Whart. Cr. §§ 1134 ; 1 Archb. Cr. Pr. 997 ; 3 Greenl. Ev., § 215. And by some of the cases and text-books this presumption has been held conclusive. By others it has been held that this presumption may be rebutted ; and this last rule we think the sounder one, for it is hardly reasonable to establish or adhere to an arbitrary date which will hold a party guiltless one day and guilty the next of the same offense, which would be the case if we were to hold a person incapable of committing crime the day before he became fourteen years old, and yet liable to all its penalties the next day, without any perceptible change physically or mentally or otherwise in the offender. It is perhaps giving to one *doli capax* all that he is entitled to by allowing him the benefit of the presumption that he is incapable of committing this particular crime while under the age of fourteen years, leaving the *onus* upon the State of removing this presumption by satisfactory proof. The judge of the criminal court charged in conformity to this view, and we approve his charge as correct.

There is no controversy as to the perpetration of the offense. The girl testifies to the fact of penetration, and the boy himself admitted that he had accomplished his purpose. He resorted while

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in the act, to the usual practices of older offenders in such cases, of choking and threatening to kill, to prevent an out-cry, and fled immediately, and was captured some fifteen miles from the scene of the outrage.

We are of opinion that the evidence in this case was sufficient to justify the jury in finding that the legal presumption of incapacity to commit the crime was rebutted.

The judgment will be affirmed.

Judgment affirmed.

MOSELEY V. VANHOOSER.

(6 Lea, 286.)

Sunday — contract on — when complete.

On Sunday two parties agreed on the terms of sale of a yoke of oxen, subject to the purchaser's inspection of the oxen and satisfaction with them. The next day the purchaser inspected the oxen, approved and took them, and left a part of the price at the vendor's house. *Held*, a valid sale.*

REPLEVIN. The opinion states the facts. The defendant had judgment below.

E. L. & J. A. Gardenhire, for Moseley.

R. A. Cox, for Vanhooser.

E. H. EWING, Sp. J. This was an action of replevin for a yoke of oxen, brought by the plaintiff in error. It was submitted to the Circuit judge without a jury. He was of opinion that the proof preponderated in favor of the defendant and gave judgment accordingly. We scarcely agree with the judge in regard to the preponderance of the proof, but should not think of reversing his judgment upon this ground. The scales were too nearly balanced to justify this course, upon the well-settled practice of this court.

A ground however was taken below, and is insisted on here, which demands further consideration. The oxen, the subject of the litigation, are said to have been sold (if sold at all) by the plaintiff

* See *Kinney v. McDermott* (55 Iowa, 674), 39 Am. Rep. 191; *Winfield v. Dodge*, post.

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to the defendant on Sunday. This, it is said, appeared in proof and was brought to the notice of the Circuit judge, who notwithstanding rendered judgment in favor of the defendant. It is insisted now that a sale made on Sunday is void as against the statute upon the subject, and is contrary to public policy, and that the sale being void, left the property where it was, viz., the property of the assumed seller in this case, the plaintiff.

In support of this view, section 1723 of the Code is referred to which is as follows, "If any merchant, artificer, tradesman, farmer or other person shall be guilty of doing or exercising any of the common avocations of life, or of causing or permitting the same to be done by his children or servants, acts of real necessity or charity excepted, on Sunday, he shall, on due conviction thereof before any justice of the peace of the county, forfeit and pay three dollars, one-half to the person who will sue for the same, the other half for the use of the county." It is insisted that this statute forbids the sale and purchase of cattle on Sunday under a penalty, and that a contract made in violation of it is void, and the case of *Amis v. Kyle*, 2 Yerg. 33; 24 Am. Dec. 463, is cited as authority for this position. It is further insisted that the contract is in violation of public policy and therefore void, and the cases of *Stillman v. Looney*, 3 Cold. 21, and of *Parks v. McKamy*, 3 Head, 297, and especially *Wetmore v. Brien*, id. 723, are cited; see also, *Perkins v. Watkins*, 2 Buxt. 187.

To these positions of the plaintiff, it is answered: 1st. That the contract was not made on Sunday in fact; that there were negotiations about a trade on Sunday, but that the contract was really not complete until Monday, and thus the law was not violated in the making of the contract. 2d. That the contract is not void, even if made on Sunday. We must look to the proof to see how this was. The plaintiff denies that there was any sale on Sunday or any other day. The defendant says there was a sale, and that it was so far completed on Sunday as that the price was agreed on, the time of delivery and every thing else, but that he was to see the oxen and see what condition they were in, before he was to be absolutely bound to take them. He did not see the plaintiff any more afterward, but went the next day to where the oxen were, approved them, took them, and left at the plaintiff's house the larger portion of the purchase-money. The defendant says further in his testimony, "that some talk had been had between him and plaintiff

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before that Sunday, but that he had not bought the oxen before Sunday."

This proof, it may be, would bring the case so far within the Sunday statute as to enable the party to bring an action *qui tam* for the penalty. This however we do not decide, as that question is not before us. The question before us is, was there a contract made on Sunday? We are of opinion there was not. Certainly if Vanhooser, after Sunday, had done nor said any thing more, he would not have been bound by what was said and done on Sunday. If a contract is to be held void because made on Sunday, it certainly should be technically complete on that day. If it had been technically complete on that day, a question of great gravity would have been presented to the court. That is not however pretended, and we think it not proper, upon a hypothetical case, to decide a matter of so much importance.

The case will be affirmed.

Judgment affirmed.

RAINS V. HAYS.

(6 Lea, 303.)

Advancement — deed to child's husband — money paid as surety for him.

A deed of lands by a father to his daughter's husband is not presumed an advancement to the daughter, and so of money paid by the father as surety for the husband.

BILL to compel an accounting for advancement. The opinion states the case. The defendant had judgment below.

E. H. East, and T. W. Haley, for complainant.

Demoss & Malone, for defendants.

DEADERICK, C. J. This bill was filed in the Chancery Court at Nashville by one of the heirs at law and distributees of W. H. Rains, deceased, against the others, and against Matlock, the husband of the deceased daughter of the intestate.

The object of the bill is to require the defendants to account for advancements made to them, and for a settlement of the estate.

In his life-time the intestate, as charged in the bill and as appears from the evidence, made advancements in unequal amounts to his children, partly in real, and partly in personal estate. It is also alleged and appears in proof, that in the life-time of his daughter, Mrs. Matlock, the intestate conveyed to Matlock, her husband, a tract of seventy-five acres of land, estimated to be worth from \$2,000 to \$3,000. After this conveyance and before her father's death, Mrs. Matlock died, leaving a son of her marriage with Matlock. This son, Willeford E. Matlock, is made, with his father, a defendant to this suit, and in the distribution it is sought to hold him chargeable with the value of the tract of land conveyed to his father, as an advancement to his mother.

The chancellor ordered an account to be taken of the advancements, but directed that defendant Willeford E. should not be charged with the value of the tract of land conveyed to his father. He also directed that certain money paid by intestate for Hays as his surety should not be charged to Hays' wife in the account ordered. From this decree complainant has appealed.

The argument here has been entirely addressed to the question of defendant W. E. Matlock's liability to be held to account for the land conveyed to his father.

The chancellor's opinion may be found in 2 Tenn. Ch. 668, in which he has examined and cited the authorities, which may be said to be to some extent conflicting. But the weight of them sustains the conclusion of the chancellor.

In our own court it has been held that in case of a gift of slaves to the grandchildren of the donor, although reserving the use to her daughter, neither for their use nor value could the mother be chargeable as an advancement to her, because the gift of the slaves was not to the mother but to her children, the court saying that "it is true that the daughter takes a benefit under the deed — that is, the use of them — the primary object obviously being to secure the possession and use of the slaves to the daughter as a means of enabling her the better to support, raise and educate the donees". 1 Swan, 487. In the same case, an advancement is defined to be "a gift by a parent to his child by anticipation, in whole or in part, of what it is supposed the child would be entitled to on the death of the parent." But it was held in the case cited that the slaves could not be charged to the daughter of the donee, because no estate in them was given to her which

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could be alienated, or to which her husband's marital rights could attach, but they were expressly given to her children.

The record does not disclose, upon the part of the intestate, that he intended the conveyance of the land as an advancement to his daughter, or that she agreed to accept it as such. It is simply an absolute and unconditional conveyance to the husband.

Nor do we think that Hays' wife should be charged, as an advancement to her, with the debt due from Hays to the estate of intestate, for money which he was compelled to pay as surety for Hays. This may be a debt against Hays, but certainly is not an advancement to his wife.

The chancellor's decree will be affirmed, and the cause will be remanded to the Chancery Court for the taking of the account ordered and for further proceedings. The costs of this court will be paid by complainant, and the costs below as may be adjudged by the chancellor.

Decree affirmed.

FREEMAN, J., dissents as to the deed to Matlock.

NANCE v. GREGORY.

(6 Lea, 843.)

Usury—right of purchaser in bankruptcy to plead.

A purchaser, at a sale by an assignee in bankruptcy, of land subject to a mortgage of which he has notice, cannot set up usury against the mortgage.

BILL to enjoin mortgage sale. The opinion states the facts. The complainant had judgment below.

J. P. Helms, for defendants.

FREEMAN, J. Complainant says Gregory had become a bankrupt, and at his assignee's sale he became the purchaser of a certain house and lot in the city of Nashville. He says further, that on examination of the title he finds that Pettus held a mortgage on the house and lot, and he believes, and so charges, that the greatest part of the consideration for said mortgage is usurious—that the real consideration is \$600 and interest, and the balance is usury. He then charges that Pettus had two judgments against Gregory for \$300

each, and they are the only real considerations for said mortgage: but as the knowledge of these rests more particularly with defendants, he prays a discovery from them as to the same. He then puts specific interrogatories as to what was the original consideration of said mortgage, whether the said consideration was in a note originally, or judgments, and if so, what note and what judgments, with date and amounts. He then specifies by asking whether the only consideration for the mortgage was not two judgments on W. Robertson's docket, of \$300 each, and for a detail of the whole transaction. Pettus having power to sell the property under the mortgage, he prays for an injunction as to this, and also as to enforcing it as to whatever of usury there may be in the debt. This is his bill, or its equities.

After demurring to the jurisdiction on various grounds not necessary to be noticed, Pettus answers, admitting the bankruptcy, the sale to complainant by his assignee, and says: "However, as complainant intimates that he was ignorant of respondent's incumbrance, respondent states, that to the best of his knowledge and information, complainant and the assignee examined together the mortgage registered as charged, and then avers that complainant heard said assignee announce publicly at the opening of said sale that said property would be sold subject to respondent's mortgage, and that he bought the same with full knowledge of its existence and contents."

We need not here consider the question discussed by the learned chancellor as to the effect of this answer—whether it is responsive to the bill, at least so far as it charges that complainant heard the assignee announce publicly at the opening of the biddings that the property was sold subject to the mortgage. For the purposes of this opinion the fact of registration must be held conclusive on the purchaser that he had notice of the contents of the mortgage. This being so it is not important to his legal rights whether he had actual notice of it or not. We think he did, however, from the proof in the record.

The question presented on this aspect of the case is whether the purchaser at an assignee's sale of property, incumbered with a mortgage for a specified sum, of which all parties have notice by law, can afterward file his bill on the simple footing of purchaser to get clear of the usury in the debt secured by the mortgage. A majority of the court think he cannot.

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It is ingeniously argued that such a purchaser stands in the shoes of the assignee, who stands in the shoes of the bankrupt, therefore he has all the rights of the bankrupt in reference to the property.

This is plausible, but is not sound and fairly the fact of the case.

The bankrupt is the original contractor of the debt, and is relieved in a court of equity on the ground that though he is equally participant in the violation of law, he is an oppressed debtor *in vinculis* in the power of the lender, and therefore the principle on which the relief rests is the protection of borrowers against oppressive exactions by lenders. *Bensley v. Homier*, 42 Wis. 635. This is all very well settled and understood. Whenever the borrower comes into a court of equity for relief against usury he is backed by the consideration referred to, and is entitled to the proper relief.

But does the purchaser of property incumbered by a mortgage, given to secure a debt tainted with usury, stand on the same ground? We take it that it is almost too clear for argument that he does not.

He is not borrowing money — is not a needy debtor oppressed by demands difficult to be met, and which harass him perhaps beyond the stage where prudence and sound judgment guide his conduct; on the contrary, the purchaser is a man with money to invest, a surplus which he desires to use. He is perfectly free and unfettered, can buy the property or not as he chooses, and when he does, he buys at the best price he can get it at, and for profit. He knows it is incumbered, and under our registration laws all parties bidding at a public sale as this is are charged with like knowledge, and may fairly be presumed to bid in view of this fact. Buying under these circumstances he necessarily bids for the property as charged with the incumbrance of the mortgage, and so gets it at a price reduced by the sum of the debt secured upon it.

Now is it not contrary to the real facts of the case to say that such a purchaser under such circumstances stands in the shoes of his vendor, so far as the equities against usury are concerned?

If the borrower is relieved because he is deemed in chains and in the power of the lender, it is certain the purchaser can stand on no such ground in any court. To give him the same measure of relief that is awarded to the borrower, is to put parties standing on diverse grounds and under circumstances as entirely opposite as can be conceived, on the same footing, and entitled to the same measure of relief. This cannot be sustained, we think, on any sound view of law, logic or justice.

It is said however the assignee of the bankrupt stood in the shoes of the bankrupt, and could have avoided the usury, and the purchaser from him should be entitled to do the same. But the cases are entirely dissimilar. The assignee is one to whom the property and rights of the debtor are assigned as a trustee for the benefit of creditors, and his duty is to so administer the fund as to effectuate that trust. If illegal charges are on the property, he is bound to disincumber it for the advantage of the beneficiaries of the fund. He takes the place, not as purchaser from, but simply as assignee of the debtor.

But the purchaser occupies no such position — has no such obligation or duties imposed on him. He is in such cases only an eager speculator—in most cases watching to catch a bargain — seeking to make money for himself by purchasing at the lowest rate the property of the unfortunate debtors, who are compelled, under the law, to have their estates sold at great disadvantage, usually, and proceeds appropriated *pro rata* to their debts. We all know how this is, and cannot as judges shut our eyes to facts well known to us as men observant of the ordinary incidents of business transacted in the country, with which we are all familiar. In view of these facts we are unable to see any sound principle on which such a purchaser can base his claim to invoke the aid of a court of equity in his favor. On the contrary, we think the equities are fairly on the other side. He gets the property at a price reduced by the amount of the incumbrance upon it — certainly to this amount, and usually does better for himself than even this, for we know from observation, that property sold thus incumbered generally brings less than its real value, after deducting the sum of the charge on it, owing to the indisposition of purchasers to bid freely on property thus charged, or to buy at all property incumbered by claims of third parties. Be this as it may, the purchaser gets the full benefit of the amount of the incumbrance in the reduced price he pays for the property. Having done this, ought he not to be held in equity and good conscience to have assumed the burden by thus buying it? We think this the fair result of the facts of such a transaction.

Suppose an ordinary sale where the vendor tells the vendee, this property is charged with a lien of five hundred dollars. The purchaser thus notified, as a matter of course, offers five hundred dollars less for it, and if he buys, thus gets this sum deducted from

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what he would otherwise have paid. Could such a purchaser have any equity after this to avoid or defeat the payment of this debt or lien? He voluntarily took the property subject to this charge, and is fairly estopped to interpose any objection to its being enforced.

The case of the purchaser at the bankrupt sale in this case is precisely the same in its essential legal aspects; and on the facts we have suggested as incident to such purchasers, the case is much stronger against him than the ordinary purchaser such as we have instanced.

The plain facts are, that the complainant purchased with knowledge fixed on him by law, and no doubt in fact, of this mortgage, got the property at a price reduced by the amount of this mortgage, and now files this bill, seeking to discover the taint of usury, and thus reduce the amount of the mortgage debt. If he could succeed, to that extent he would be benefited by being allowed to cut at both ends—reduce the original price by the amount of the mortgage debt, and then get clear of a part of the mortgaged debt, and to this extent he would be getting the property but pay nothing for it. Instead of this being an equitable claim, it would be gross injustice.

We add here, that the equity of redemption had been waived by Gregory in the mortgage, so that it is a clear case of purchase of property subject to a known incumbrance of a fixed and definite sum. Gregory and the assignee had both declined to interpose the question of usury, and so the property was sold as it stood in their hands. No new equities present themselves in favor of the purchaser, as we think. We think, for these reasons, that on sound principle, the complainant's claim cannot be sustained.

When we turn to authority, there is apparent conflict in the view of the courts on this question. From cases cited in the opinion of the learned chancellor who decided this case, it has been held in England that a court of equity gives relief as to usury in favor of the assignee of a bankrupt as well as to the other creditors, and on favorable terms. To this, so far as the assignee is concerned, we can see no objection; but as we have shown, this does not, as we think, meet the question presented in the case before us. It is clear that the principle that underlies the doctrine of a court of equity in relieving against usury, is one the theory of which is, that the right to the relief is purely personal to the borrower, or his personal representative as administrator, distributee or heir. It is given

on the idea of personal advantage taken of his necessities, and is an equity which he can enforce or not, at his option. The borrower is considered as the victim—as said in one of our own cases, “the slave of the lender, *in vinculis*.”

These grounds for relief, as we have shown, have no application whatever to a purchaser of the estate of the borrower, with notice of an incumbrance fixed upon it, and who buys subject to the charge, and consequently takes the property *cum onere*.

It seems to be held in New York that a purchaser of the incumbrant estate may obtain relief against usury; at any rate, such right would seem to be included in the principle laid down in some of the cases in that State. *Williams v. Till*, 36 N. Y. 325, and cases cited.

On the contrary, it has been held in a number of cases in other States that the question of usury is strictly a personal one to the borrower, and could not be set up by a subsequent mortgagee or purchaser. *Ready v. Husbner*, 46 Wis. 692; s. c., 32 Am. Rep. 749; see also cases cited.

The same doctrine is held by the Supreme Court of Michigan, and that a subsequent purchaser cannot avail himself of this defense. *Sellers v. Botsford*, 11 Mich., 59; *Bank v. Kimmel*, 1 id. 84; see also, *Spaulding v. Davis*, 51 Vt. 79.

It has also been repeatedly held that the purchaser of an equity of redemption of one who purchases subject to the mortgage cannot set up usury as against the incumbrance or charge on the property purchased. *Conover v. Hobart*, 24 N. J. Eq. 120; *Bridge v. Hubbarl*, 15 Mass. 103; 8 Am. Dec. 86; *Reading v. Weston*, 7 Conn. 413; 18 Am. Dec. 89; *Stephens v. Muir*, 8 Ind. 352. *Contra*: 20 N. H. 100; *McAllister v. Jerman*, 32 Miss. 142. These latter cases are cited from, and will be found in Albany Law Journal, vol. 20, p. 3.

For the reasons we have given, we think as applicable to a case like the present, the principle thus announced is the correct one, and is sustained both by principles as well as the weight of authority. As the purchaser in such a case does not come within the principle on which a court of equity gives relief against usury, he must be repelled, unless the statutes of our State give him a remedy. It is certain no such right is given by our Code. The plea of usury is allowed in favor of the original debtor, his surety, accommodation indorser, or his personal representative, by section 1951 of the

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Code, and the judgment creditors of the debtor, by section 1955, but to no one else.

We therefore conclude, the complainant, for the reasons given, in no aspect of the case is entitled to the relief sought.

[Omitting minor consideration.]

The result is that the decree of the chancellor will be reversed and the bill dismissed with costs.

STARK V. SPERRY.

(6 Lea, 411.)

Usury — commissions for advances.

A contract to pay, as commissions to a commission merchant, two per cent in addition to legal interest, for moneys advanced, is usurious.

BILL to surcharge and falsify an account. The opinion states the case.

Demoss & Malone, and *J. A. Cartwright*, for complainants.

Bate & Williams, and *Wilkin & Chamberlin*, for defendants.

DEADERICK, C. J. In September, 1869, the complainants consigned to Sperry & McCrory, commission merchants at Nashville, forty-five barrels of whisky, to be by them stored for sale in their warehouse. Within a short time thereafter other consignments were made, until they had in store with Sperry & Co., successors to the first named firm, 315 barrels.

This stock was reduced by sale until September 1, 1871, when the firm of Nelson & Sperry succeeded the second named firm, and held, as factors and commission merchants, 298 barrels of the whisky.

In the meantime large advancements had been made to complainants, and when Nelson & Sperry succeeded to the business, the complainants were indebted to Sperry & Co. in the sum of \$18,914.22, according to their statement, which sum was assumed and settled by Nelson & Sperry, and complainants assumed this liability to them, the 298 barrels of whisky being held thereafter in store by them.

By the 2d of July, 1872, Nelson & Sperry had sold all the whisky, which, according to their account of sales rendered, produced a sum sufficient to pay said advances and charges and \$6,847.78 beside. Of this sum defendants paid complainants \$5,000, and were willing to pay all if complainants would accept it in full settlement between them, but Hilliard declined to receipt in full in the absence of Stark, and so the matter rested until August, 1873, when complainants filed their bill in this case.

The bill, which seeks to surcharge and falsify defendants' account, charges that the contract between complainants and Sperry & McCrory was, that the complainants were to store whisky with defendants on the following terms: Defendants were to charge for storage twenty-five cents a barrel for the first month and fifteen cents for each succeeding month, and were to furnish, loan or advance whatever sums of money complainants might want, at two per cent for sixty days, and then at six per cent per annum as long as they wanted it, or until the whisky was sold; that there was no contract for insurance, and the rates charged are excessive, as well as the rates charged for leakage and cooperage; that the charge of one per cent government tax on sales, and the charge for guaranteeing one sale on credit, were unauthorized by the contract, and the charge of certain interest at several rests, being the two per cent for sixty days on advances, was illegal and contrary to the contract, and usurious; that they sold whisky contrary to instructions, being interested as purchasers, after enough had been sold to pay all advances and charges.

As to these several charges, the answer admits that twenty-five cents per month for the first, and fifteen cents per month for subsequent months, was the price agreed upon for storage; but as to insurance, leakage, cooperage and one per cent government tax, and the charge for guaranteeing the sale on credit, it is insisted by the answer that the charges were legal, reasonable and in strict conformity with their contract, as was the charge of two per cent for advances for sixty days, and insist upon their right to charges for sale of the whisky, in which complainants allege defendants had an interest as purchasers.

[Omitting a minor inquiry.]

But it is insisted that the contract to pay two per cent for advance for sixty days, in addition to legal interest stipulated for as

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commissions for advances, was a device to cover a usurious rate of interest, and is in fact usurious, and therefore void and cannot be recovered, and the case of *Chester v. Apperson*, 4 Heisk. 639, is cited and relied upon as sustaining this conclusion.

The bill filed by Chester sought to set aside, for usury in the note, a judgment obtained thereon, and alleged that Apperson was his commission merchant to whom he consigned his cotton, wheat and other products for sale; that Apperson furnished him groceries, and made cash advances to him, and taking his note for such advances, charged him at the rate of two and one-half per cent commission, and also legal interest; that the notes ran for two to four months and were then renewed, and in the new notes, which bore legal interest, was also included the two and one-half per cent commissions. There were other transactions, as alleged, between the parties. Upon demurrer, the chancellor dismissed the bill, and the complainant appealed. This court held, that notwithstanding the judgment at law, it was a proper case, owing to the embarrassment of the remedy at law, for chancery jurisdiction, and reversed the chancellor's decree dismissing the bill, and remanded the cause for answer and further proceedings. Judge FREEMAN in delivering the opinion of the court said: "The facts present a case of usury beyond all question, and of continuous usurious transactions running through the whole period of the dealings between the parties." Chancellor COOPER in his opinion in this case, reported in 2 Tenn. Ch. 304, held that a charge of interest for an advance of money as commissions for such advance, in addition to legal interest, which is part only of an entire contract which embraces other matters, is not necessarily usurious, but it is a question of fact whether usury was intended. And for this proposition he cites numerous New York and Alabama cases which certainly sustain his conclusion that the contract in this case was not usurious and was therefore obligatory upon complainant.

But adhering to our decision in the 4 Heiskell case, which is in substance the same as this, we hold that the contract was usurious.

The two per cent commissions were charged in addition to the legal rate of interest, and solely for the use of the money advanced. For each item of service connected with the transactions there was a separate and distinct charge of a specific sum. In this case the charge for commission on advance of money was for that alone, not for commission on sales, storage or other service, just as it was in

the case of *Chester v. Apperson*. Both were cases of consignments to commission merchants of products to be stored and sold, on which the merchants agreed to make advances, and for which advances the two per cent was charged, and not for other service as factors.

As to this matter of two per cent commission on advances the chancellor's decree will be reversed, and said commissions will be disallowed and deducted from the charges against complainants.

PILE V. PILE.

(6 Lea, 508.)

Marriage — survivorship as to note — husband and wife.

If a husband takes for a debt due him a note payable to himself and his wife, it is presumed to be intended as a gift to her if she survives him; but he may defeat this right by will.

THE opinion states the case.

W. W. Goodpasture, for complainants.

H. R. Gibson and *D. L. Snodgrass*, for defendants.

DEADERICK, C. J. Two questions are presented by this record for our determination:

1st. Who are entitled to the note in the pleadings mentioned, due from Jno. C. Wright, which was made payable to said Elijah Pile and his wife?

2. What credits is Jno. C. Wright entitled to upon said note?

In February, 1872, testator sold and conveyed to said Wright a tract of land in Fentress county, for \$3,300, taking his note therefor, due at two years from date, bearing interest from date, and payable to himself and wife.

The wife had no interest in the land, it having descended to testator from his father, nor had they ever lived upon it. The purchaser however desired that the wife should unite in the conveyance, having an impression that it was necessary to convey a perfect title. The wife objected to signing the deed, and was told by her

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husband it was all right; the note was for them to live on, and her name was in it, and if she survived him it would go to her. She then signed the deed. On the 28th of March, 1876, the testator made his will. In his will he gives the note to four of his children. He died some time during the same year. After the execution of the note the testator took possession of it and received payments on it.

The wife's signature to the deed was nugatory, as it neither conveyed nor released any interest in the land. Testator was the absolute owner thereof and had a right to convey it. So no consideration moved from the wife entitling her to any share of, or interest in the note. She stood simply upon her right of survivorship under the law, as in cases where the husband, upon sale of his own property, or loan of his own money, takes a note payable to himself and wife. In such a case, in the absence of evidence showing an intention and an act on the part of the husband to make a different disposition of it, the wife would take the note as survivor of her husband.

The law makes a *prima facie* case in her favor, from the fact that the husband took the note in their joint names, and nothing else appearing, this raises the presumption that he intended, if she survived him, that she should have the note as a gift from himself. *Johnson v. Lusk*, 6 Cold. 113. See also 1 Cooper Ch. 3; *Sanford v. Sanford*, 45 N. Y. 723. The case of *Sanford v. Sanford* was decided by the New York Court of Appeals in 1871. The facts found by the referee were, that Jos. H. Sanford died in 1866, leaving his wife, Maria, surviving; that in June, 1864, he loaned his son, William A., \$5,000, taking his note payable to himself and wife. During his life testator kept the note, received some payments on it, and after his death the wife brought suit upon it in her own name. On the trial defendant offered to prove that his father, before the making of his will, had intended to bequeath this note to his wife, but upon consultation with her, directed that a bequest of \$10,000 to her in lieu of the note be put in the will, which was done. This was objected to, and the evidence excluded. This was held to be error, and in commenting upon the effect of the evidence offered and excluded, the court say that the evidence offered "was a strong evidence of her acceptance of the provision made" for her in the will, and that the note belonged to the estate and not to her. This might bear the construction that the wife's assent was essential to the husband's right to dispose of the note as he might choose. But this could not have been the

intention or meaning of the learned judge who delivered the opinion, as in another part of it he says: "Assuming that taking the note in the name of himself and wife shows that the husband intended thereby to give it to her if she survived him, yet during the life of the husband the note is subject to his control and disposition. The wife has no legal interest in it until his decease."

This is in accord with the weight of authority, and it being assumed that the wife has no interest in the note during the husband's life, and only after his death takes an interest upon the legal presumption that the husband so intended and has made no different disposition of it, the next question is has he made any such disposition rebutting the presumption that he intended his wife to take?

What acts then will rebut this presumption? In 1 Dan. Neg. Inst., § 257, it is said, citing various adjudged cases to sustain the text, "that any act of the husband during marriage manifesting a distinct purpose to make his wife's choses in action his own, operates as a reduction into possession, and bars her right of survivorship; but mere intention unaccompanied by act will not suffice." So, "if the husband elect to bring suit upon the instrument in his own name in cases in which he may join his wife or not as he pleases, or collects the proceeds." And a case is cited in which it is held that "if the husband assumes ownership of the instrument and places it amongst his own effects, and indicates no intention to hold it in trust for his wife, it would seem that this is sufficient."

This is said in respect to the wife's own choses in action, but the reasoning and authorities apply with at least equal force to the case of a note executed jointly to husband and wife, in which as we have seen, the wife has no interest during her husband's life.

The only acts manifesting the intention of the husband to bar the wife's right in this case are his exclusive possession and control of the note, and the distinct and explicit disposition of it by his will to four of his children, which he executed some time before his death.

It is true, as a will to convey to his devisees and legatees his property it only took effect to vest them with rights at his death; but as an act declaratory of his purpose and intention that certain named persons should have this note or its proceeds, it was done and completed before his death. It certainly was an "act of the husband during marriage manifesting a distinct purpose to make his

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wife's choses in action," or rather his own choses in action, subject to his exclusive control and disposition, and thus to defeat her right of survivorship.

If to bring suit in his own name, or transfer the note to another, or place it among his valuable papers, claiming it as his own, would be sufficient to defeat his wife's right of survivorship, we are of opinion the declaration of such intention by the act of signing and duly executing his will is sufficient to effect the same object.

The chancellor held that the administrator of the wife, who died pending the suit, was entitled to recover. In this we think there is error, and reverse the decree in this respect, holding that the executor of Elijah Pile is entitled to recover the amount due on said note from Wright, to be distributed as directed by the will.

[Omitting the second inquiry.]

Decree reversed.

WILCOX V. STATE.

(6 Lea, 571.)

Criminal law — bar — robbery — assault with intent to kill.

A conviction of robbery is a bar to a subsequent indictment, founded on the same transaction, for assault with intent to murder.

CONVICTION of assault with intent to murder. The opinion states the case.

J. E. Rice, for defendants.

Attorney-General Lea, for State.

DEADERICK, C. J. Plaintiffs in error were convicted at March term, 1880, of the Criminal Court of Montgomery county, for an assault upon Thomas Wengler, with intent to commit murder in the first degree. At the preceding January term of said court they had been convicted of robbery from the person of said Thomas Wengler, and were sentenced to fifteen years' imprisonment in the penitentiary. From this judgment they did not appeal, but have appealed from the judgment at the March term, 1880.

- In the first named case however they pleaded their former conviction in the robbery case, along with the plea of not guilty.

His honor said to the jury in his charge: "You have heard all the proof. You have heard witnesses testify that the prosecutor, Wengler, was assaulted and robbed, and you have seen from the record, that a former jury has tried and convicted them for this robbery. Now, do the facts in this case make out two separate crimes—two distinct offenses—can you so separate the different points in the testimony? Do they materially so separate themselves that you can see in them two separate crimes? Can you eliminate from the whole proof those facts which are and were necessary to make out the crime of robbery, of which these prisoners have been convicted, and remain satisfied that separate and apart from these facts, proof enough still remains to convict them of this assault with intent to commit murder?"

His honor also instructed the jury, if "all the evidence necessary to make out the robbery would be necessary to make out the murderous assault, then there is really but one offense, and to punish these persons again would be to punish them twice." Although the part of the charge last quoted implies that to sustain the defense of former conviction, it is necessary that all the evidence to make out the one offense is required to make out the other, yet in the part of the charge first quoted, the jury are correctly instructed in effect that the proof must show facts to make the offense of intent to murder, other than those essential to the conviction for robbery, and this instruction is repeated in another part of the charge.

Robbery is defined to be, "the felonious taking of property from the person of another by force". 3 Greenl. Ev., § 223. Or as defined by our statute, "robbery is the felonious and forcible taking from the person of another, goods or money, by violence or putting the person in fear". Code, § 4631.

The prosecutor, upon the trial, testified to a violent and dangerous assault made upon him by the defendants, and he stated also on his cross-examination, that he had testified to the same facts upon his examination in the previous trial of defendants on the charge of robbery. It was for the assault at the time of the robbery that the conviction was had in this case. Force and violence were proved in each case, and were alike essential in both to sustain a conviction. It was one continuous transaction, in which defendants perpetrated

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a robbery, by violence, dangerously wounding the prosecutor. Being one transaction, the prosecutor may carve as large an offense out of it as he can, but it is said "he must cut only once". 1 Bish. Cr. L., §§ 804, 891.

In *Fiddler v. State*, 7 Humph. 508, defendant had been convicted for running a horse race upon a public road and fined. He was afterward convicted for betting on the same race. This court, upon appeal, reversed the judgment, holding the running of the race was a necessary ingredient in the offense charged, and the party has been punished for that offense and cannot be punished again, although the offense is different. See also *State v. Chaffin*, 2 Swan, 493. And in *State v. Cameron*, 3 Heisk. 78, it was held, upon an indictment for failure to pay over revenue, an acquittal on an indictment for its embezzlement was a bar, the court holding that the failure to pay over was evidence of conversion, and the acquittal upon the charge of conversion is a bar to the prosecution for failing to pay into the treasury.

The assault or violence in the robbery case being an essential element or ingredient of the offense, and constituting an important and material part of that offense, as it does in the offense of assault with intent to commit murder, and having been once punished in the robbery case as a material part thereof, it cannot be again punished, as it would be if the judgment below were allowed to stand.

The error was not so much in the charge of the court as in the failure of the jury to find that they could not eliminate the facts establishing the robbery, and still have facts enough to sustain the charge of assault with intent to murder.

The judgment of the criminal court must be reversed.

Judgment reversed.

 LONG V. TAXING DISTRICT.

(7 Lea, 134.)

Municipal corporation — ordinance — illegal.

Without special legislative authority, a city cannot by ordinance require cotton merchants to keep, for the inspection of the police, a record of the names of purchasers and the quantities purchased.*

* See note, 35 Am. Rep. 703.

CONVICTION of violation of ordinance. The opinion states the case.

L. & E. Lehman and W. M. Randolph, for Long.

C. W. Heiskell, for Taxing District.

COOPER, J. The plaintiff in error was arrested by warrant, and fined by the president of the commissioners of the Taxing District \$10, and again upon appeal by the Circuit Court without a jury, for violating an ordinance of the Taxing District of Shelby county, and appealed in error.

By ordinance 368 1-2 of the Taxing District it is provided : " That any person engaged within the limits of the district in the business of buying and repacking loose cotton shall be deemed a merchant or trader, and no person shall engage in such business except after taking out a merchant's license in the mode prescribed for merchants generally and complying with the terms and conditions following: No person shall engage in the business aforesaid unless his license state on the face of it that it is taken out with a view to engage therein ; and in addition to the other conditions prescribed by law and ordinance for taking out a merchant's license, such person shall give a bond in the penalty of \$1,000 conditioned that he will keep in a book specially provided for the purpose a daily record of the name of each seller of loose cotton, and the quantity of each purchase, and that he will keep such book at all times open to the inspection of the police. A failure to comply with these requirements or the terms of said bond shall be deemed a misdemeanor."

The plaintiff in error, E. W. Long, is engaged in the cotton business in the Taxing District of Shelby county, has a place for the business, and a license from the Taxing District for one year from April, 1881, to April, 1882. In the course of his business he buys and sells cotton in bales, loose cotton, ginned and once baled but separated from the bales, and loose cotton ginned, and cotton in the seed. The buying and repacking of loose cotton is the larger part of his business. He also in the course of his business buys and repacks or bales the loose cotton bought by him, and sells the same in the bales. The misdemeanor with which he is charged consisted in this, that he failed and refused, in April, 1881, after he had obtained and paid for the aforementioned license, and after

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the passage of the above ordinance, to give the bond, required by the ordinance, to keep the book prescribed or to keep a daily record of the name of each seller of loose cotton and the quantity of each purchase, and to keep such book open to the inspection of the police.

It was proved by a witness, the president of the cotton exchange, that loose cotton is liable to theft, and that it is exceedingly difficult to ferret out the thief. When the dealers in loose cotton are interrogated they refuse to give the names of the persons from whom they buy, or to permit their books to be examined. The witness says that with the ordinance in question faithfully observed, much of the dishonest dealing in loose cotton could be broken up. The loose cotton which accumulates during a season at Memphis is called the "city crop," and makes a considerable item and would be much larger and inure to the benefit of the true owners were it not for the dishonest dealing in it.

The evidence of this witness was excepted to by the defendant, but admitted by the court.

A city council, it has been well said, is a miniature legislature, authorized to legislate for a locality, and its ordinances within the power intrusted have all the force of laws passed by the legislature. But there is a broad distinction between the general power to make laws and the special power of a municipal corporation to enact by-laws. The corporate council is restricted to such matters, whether specially enumerated or included under a general grant, as are not at variance with the general laws of the State, are reasonable and adapted to or proper for the purposes of the corporation. Authority to make by-laws does not include the power to legislate on general subjects. Whenever a by-law seeks to alter a well-settled principle of the common law or to establish a rule interfering with the rights of an individual or the public, the power to do so must come from plain and direct legislative enactment. No implied power to pass by-laws, and no express general grant of the power can authorize a by-law which conflicts either with the National or State Constitution, or with the statutes of the State, or with the general principles of the common law adopted or in force in the State. Ordinances must be consistent with public legislative policy, may regulate not restrain trade, and must not contravene common right. These are general principles universally recognized, and to some extent illustrated by our own cases. *Smith v.*

Mayor, 3 Head. 245; *Maxwell v. Jonesboro*, 11 Heisk. 257; *Triggally v. Mayor*, 6 Cold. 382; *Hodges v. Mayor*, 2 Humph. 61; *Raleigh v. Dougherty*, 3 id. 11; *Mayor v. Winfield*, 8 id. 707; *Robinson v. Mayor*, 1 id. 155. The difficulty is in applying these principles to the facts of particular cases. The limit of municipal authority has never been so clearly and accurately defined as to enable the courts to say readily when it has been overstepped.

The particular ordinance under consideration is not directly authorized by any special provision in the acts under which the Taxing District of Shelby county has been organized. It is sought to be sustained under certain general provisions which are thus worded: "The local government established by this act shall have power to declare by local laws what acts shall be misdemeanors, and when committed within the Taxing District, to punish the offenders by fines and forfeitures." "And they shall have power over all other affairs in the Taxing District in which the peace, safety and general welfare of the inhabitants are interested." Acts of 1879, ch. 11, § 3, and 1879, ch. 84, § 1.

If the only power given to pass ordinances be by a general provision, the provision would be liberally construed. But if the general grant is given in connection with, or at the end of a long list of specific powers, the power conferred by the general clause would be restricted by reference to the other provisions of the act. *City Council v. Plank Road Co.*, 31 Ala. 76; *Mount Pleasant v. Breeze*, 11 Iowa, 399. Even in the broadest view the general power would only authorize suitable ordinances for administering the government of the city, the preservation of the health and comfort of its inhabitants, the convenient transaction of business within its limits, and for the performance of its general duties required by law of municipal corporations. It would not authorize general legislation proper only for the legislature of the State. To sustain such legislation by a municipal council there must be special authority.

And this brings us to the real difficulty in the ordinance before us. The ordinance does not regulate the administration of the local government, the convenient transaction of business, or the conduct of the citizens with a view to health and comfort, nor is it such as can be said to fall within the general duties of municipal bodies. It is rather intended to facilitate the enforcement of the criminal laws against theft of loose cotton. If the city can pass ordinances for this purpose in one branch of the criminal law, or for the detection

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of theft in one article, it may do the same thing for any other branch of the criminal law, or for the detection of theft in the case of any other article. If the municipality can require one class of merchants to keep a particular set of books open to police inspection in one trade, it may extend the requirement into every branch of trade and to all kinds of commercial books. But the enactment of criminal laws, and of all legislation necessary for the enforcement of those laws, either in the way of detection or punishment, belongs to the legislature of the State.

A marked peculiarity of our race has been a disinclination to have the private affairs of the citizen laid open to the public, except where it was imperatively required for the public welfare. This feeling has caused the insertion into the Constitution of the United States of its fourth amendment, and worded the seventh section of the bill of rights of our State Constitution. "The right of the people," says the former, "to be secure in their person, houses, papers and effects against unreasonable searches and seizures, shall not be violated." And the latter provides: "That the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures." Whenever the public welfare demands a departure from these fundamental principles of individual liberty and common right, it is for the legislature of the entire Commonwealth to determine, and to prescribe the mode and limits of the departure. The right cannot be conceded to a municipal corporation, at any rate in the absence of a special legislative grant. The "general welfare" clause, as it has been called, of a municipal charter, will not authorize an ordinance in advance of State legislation.

The judgment of the Circuit Court will be reversed, and judgment entered here for defendant.

This also disposes of the case of *B. H. Hayden v. City of Memphis*.
Judgment reversed.

STATE V. BURGOYNE.

(7 Lea, 173.)

Constitutional law — legislative infringement of existing rights.

A merchant purchased a stock of pistols under a license. The privilege was repealed by an act of the legislature after his license had expired but before his stock was exhausted. Offering to sell the balance afterward, *held*, that he was liable to the penalties of the act.

CONVICTION of illegally selling pistols. The opinion states the case.

Attorney-General Lea, for State.

Gantt & Patterson, for Burgoyne.

TURNER, J. The act of the general assembly of the State, passed March 14, and approved March 17, 1879, entitled "An act to prevent the sale of pistols," provides :

"Sec. 1. That it shall be a misdemeanor for any person to sell, or offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistols ; provided, that this act shall not be enforced against any persons now having license to sell such articles until the expiration of such present license.

"Sec. 2. That any person guilty of a violation of this act shall be subject to presentment or indictment, and on conviction shall pay a fine of not less than twenty-five nor more than one hundred dollars, and be imprisoned at the discretion of the court."

Burgoyne is a merchant in the city of Memphis. Before the passage of the act quoted he brought to his business pistols of several kinds. His merchant's license had not expired at the time of importation. Subsequent to the 17th of March, 1879, and after the expiration of the license under which he was operating at the date of the importation of the pistols, but while he was exercising merchant's privileges under a second license, he sold to customers pistols other than army or navy. He was convicted and judgment arrested. The State appeals.

The judge trying the cause below holds the statute invalid as to

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the sale or giving away of pistols that were owned by the defendant at and before the passage of the act ; that such were a part of his stock in merchandise before the act became a law ; that the act can only apply to pistols brought into or manufactured in the State after the passage of the law.

The act takes effect "from and after its passage," and as we have seen, provides that to sell or offer to sell constitutes an offense.

The question is, can the legislature pass a law that may in the future interfere with rights that once existed under a license that has expired before the law goes into effect ?

If the legislature may not to-day pass a law to prohibit the sale of articles contraband of peace and good morals, because a man six months ago, under a different law, supplied himself with such articles for the purposes of sale and profit, it results that so long as the merchant may have, as a part of his stock, goods purchased before the passage of the new law, he may continue to operate under the old or repealed law, no matter how long the time may be between the introduction of the new law and the completion of the closing out sales of the prohibited articles. Thus the right to sell will continue for an indefinite period of time.

The restrictive, or rather prohibitory power exercised by the legislature in this instance is a governmental one, and used for police purposes.

The clause under which the defendant is convicted operates in *presenti*, and creates a distinct offense from those to which his honor holds the law to apply. In fact, the holding is to the effect that the purchase under a license authorizing a sale at that time vests the merchant purchaser with the irrevocable right to sell at any and for all time and at his discretion so long as the stock holds out.

The law under consideration is in aid of the law prohibiting the wearing of pistols. The latter has repeatedly been holden by this court to be constitutional. It follows that no constitutional objection can be offered to this statute.

So the whole matter resolves itself into a question of the power of the legislature to make police regulations.

The purpose of the law makers was to put down the pernicious habit of going armed, — a habit that had grown into an almost universal custom, and one that could not be broken up so long as a traffic in the weapons was lawful. The latter law naturally sprung

from the former. Both "look to the regulation of relative rights, privileges and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry and the discouragement of pernicious employments."

Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority, inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order and to protect each individual in the enjoyment of his own rights and privileges, by requiring the observance of rules of order, fairness and good neighborhood by all around him. This manifestation of the sovereign authority is usually spoken of as the police power." Cooley on Taxation, 396.

The principles of this rule extend to the conference of the power of prohibition, when in the opinion of the legislature, prohibition is necessary to the attainment of its ends.

Mr. Sedgwick, in his work "On the Construction of Statutory and Constitutional Law," pp. 435-6, says: "It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given."

The private interests of the few must yield to the welfare of the many and good order in society.

The grant of a privilege license being a governmental power may be withdrawn at the discretion of the legislature.

Since writing the conclusions announced above we have been furnished briefs by the counsel of the accused, in which it is insisted the act in question is repugnant to section 8, article 1, of the Constitution of the State—"That no man shall be * * deprived of his life, liberty or property but by the judgment of his peers or the law of the land." And to the 14th amendment to the Federal Constitution—"Nor shall any State deprive any person of life, liberty or property without due process of law."

It is argued that the enactment destroys the right of property in pocket pistols, and in support of this theory we are referred to *Bartemeyer v. Iowa*, 18 Wall. 129, in which Justice MILLER says: "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law oper-

ating so rigidly on property in existence at the passage of the act as to amount to depriving the owner of his property." Justice BRADLEY says: "No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. Where such rights stand in the way of public good they can be removed by awarding compensation to the owner." Justice FIELD says: "I have no doubt of the power of a State to regulate the sale of intoxicating liquors when such regulation does not amount to destruction of the right of the property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it and deprives him of his property without due process of law. Against such arbitrativè legislation by any State, the 14th amendment affords protection."

If we admit these rulings to be restrictive of legislative power, does the case fall within them? Is the owner of the pistols deprived of the right of property therein? Does the act declare the owner shall neither sell nor dispose of them, nor use and enjoy them? Does it confiscate them and deprive him of his property without due process of law?

We think the proviso to the statute is a full and complete answer to every objection suggested by the several questions. It is: "Provided that this act shall not be enforced against any *person not having license* to sell such articles, until the expiration of such present license." This, in our opinion, preserves the right of property in its use, sale and enjoyment. All rights existing under a license had at the passage of the law are expressly reserved to the merchant. We must presume the time allowed was ample, as the agreed state of facts makes no question upon it.

The brief makes three concessions, the third of which is: "The legislature may enact laws to regulate property and restrain and direct the use of it, in the exercise of the police power, as the public welfare may require it." This, we conceive, is as far as the legislature has gone by the statute before us. It has given to the owner of property the right to sell, within a sufficient time, that property which the public welfare requires shall not be sold at all. The law does not "operate so rigidly on property in existence at the passage of the act as to amount to depriving the owner of his property."

The vested rights of property in the articles deemed injurious to the safety of society stood in the way of the public good; such rights have been compensated for and protected by the proviso. The regulation of the sale of the articles does not amount to destruction of the right of property in them.

The judgment of arrest is reversed. The judgment assessing a fine is affirmed, and the cause remanded for its execution.

Judgment reversed.

GAINES V. STATE

(7 Lea, 410.)

Criminal law — profane swearing — nuisance.

The utterance of the name of God is not necessary to constitute profane swearing. A single act of profane swearing is generally not indictable as a nuisance.*

CONVICTION of profane swearing. The opinion states the case.

J. C. J. Williams, for Gaines.

Attorney-General Lea, for State.

COOPER, J. The plaintiff in error was indicted for uttering a profane oath "in a public place, in the presence of divers good citizens, and to the common nuisance," and upon conviction, appealed in error.

Profanity is indictable when it becomes a public nuisance, and the indictment in this case is good. *State v. Graham*, 3 Sneed, 134; *State v. Steele*, 3 Heisk. 135. The averment to the common nuisance is essential. *Robinson v. State*, September Term, 1880. If the indictment be in other respects good, it is not a fatal defect to omit the allegation that the words were uttered in the presence of divers good citizens, the omission being supplied by the other averments. *State v. Wyrick*, at this term. Whenever upon a trial under a sufficient indictment, there is evidence that the swearing, or profane language, was a nuisance to the public, the offense is made out. It is not absolutely necessary that the name of the Deity should be used. Any words importing an imprecation of divine

* See *State v. Christy* (85 N. C. 595), 39 Am. Rep. 713.

vengeance or implying divine condemnation, so used as to constitute a public nuisance, would suffice. *Isom v. State*, September Term, 1880; *Holcomb v. Cornish*, 8 Conn. 375. A single utterance of a profane oath, not repeated nor in a loud voice, has been held not to be *per se* indictable. *State v. Powell*, 70 N. C. 67. And it was said by the eminent judge who delivered the opinion of this court in *State v. Graham*, that an isolated act of profanity was only punishable under the act of 1741, brought into the Code, section 1725, which imposes a small pecuniary penalty for each oath, recoverable before a justice of the peace. It is possible however to conceive of cases where even a single oath, either by its terms, its tone or its manner, might under the peculiar circumstances be held to be a nuisance. But such cases would constitute exceptions to the general rule.

The utterance in the case before us was in the public street of East Knoxville, about nine o'clock at night. Four persons heard the words, the prosecutor, at whom the oath was directed, his wife, another female who was with the prisoner, and a citizen living on the street who was induced to come to the front of his house by the loud talking between the defendant and the prosecutor. The prosecutor testifies that the defendant used the words of the indictment, less one vituperative epithet, twice; once when the defendant came to the prosecutor's house, and the second time after he had left the house, and was in the middle of the street. The proof is that the defendant, at the request of the woman who was with him, accompanied her to the prosecutor's house, and remained outside while she went in and had a conversation with the prosecutor and his wife. The other three witnesses all concur in saying that the words used were uttered only once, when the prosecutor and the defendant were in the street after the interview in the house. The two women concur in saying that the defendant used the words charged omitting the name of the Deity. The remaining witness proves the use of the words charged, but only once. Neither the mode of utterance nor the circumstances were such as to require a departure from the general rule. It is very certain that the words were only uttered once in the hearing of any other person than the prosecutor, and probably only the one time. In any view, the offense is not made out, and the judgment must be reversed.

Judgment reversed.

FIRST NATIONAL BANK OF NASHVILLE V. MCCLUNG

(7 Lea, 492.)

Negotiable instrument — payment.

A Nashville bank discounted a note indorsed by a Knoxville bank and the defendant, and made for the benefit of the Knoxville bank. The banks were regular correspondents of each other, and settled their accounts monthly. At maturity the Nashville bank sent the note to the Knoxville bank with instructions to collect and credit, and the latter, being in funds, although insolvent, and failing two days later, entered the amount due to the credit of the Nashville bank. *Held*, a payment, releasing the accommodation indorser.

BILL to enforce a note. The opinion states the case. The complainant had judgment below.

Henderson & Jourohmon, for complainants.

Caldwell & Son and *T. S. Webb*, for defendants.

COOPER, J. On January 29, 1877, H. L. McClung & Co., a firm doing business at Knoxville, executed their note of that date, payable sixty days thereafter, to W. H. Turley or order, at the Commercial Bank of Knoxville, for \$2,500, with interest at the rate of ten per cent per annum after maturity. This note was indorsed by W. H. Turley and the Commercial Bank, and was discounted by the First National Bank of Nashville, the proceeds being received by the Commercial Bank, for whose benefit the note seems to have been made, and by whom it was sent to the First National Bank. On February 1, 1877, the First National Bank returned the note by letter to the Commercial Bank for "coll." and "cr." These abbreviations are proved to mean: "Collect the note and place the amount to the credit of First National Bank's account." The note was entered on the ledger of the Commercial Bank to the credit of bills payable, in that way showing, according to the testimony of the book-keeper of the bank, that the bank owed that much money. At the maturity of the note, April 2, 1877, it was charged to bills payable, thereby showing that the Commercial Bank now owed the First National Bank \$2,500, instead of an outstanding note for a like amount, and the sum called for, like

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other collections for that bank, was passed to the credit of the First National Bank. The Commercial Bank was the regular Knoxville correspondent of the First National Bank of Nashville, and the two banks kept running accounts with each other. At the end of each month the First National Bank would order its balances remitted to New York, and the Commercial Bank would remit either the exact balance to credit of First National Bank, or an approximate amount. At the time the amount of the note was credited to the National Bank, the Commercial Bank had money sufficient to pay it, but no money was paid, and the bank was then insolvent. On the 4th of April, 1877, two days thereafter, the Commercial Bank stopped business, and made a general assignment of its property and effects for the benefit of its creditors. This bill was filed on December 8, 1877, against the makers and indorsers of the note, and the trustee of the bank, to collect the note as still outstanding. The record discloses the facts to be as above recited.

Of course it is of no consequence to the complainant whether the Commercial Bank be held liable to it by reason of the indorsement of the note, or for the money treated as collected. In either event the recovery will be the same. The contest is therefore over the liability of the makers and the first indorser. We start out with the fact that the note was executed by them for the accommodation of the Commercial Bank, and that the bank was the principal debtor. It does not appear whether the relation of the parties to the paper was known to the First National Bank, except so far as it may be inferred from the fact that the Commercial Bank sent the note to the First National Bank and received the proceeds of its discount. The Commercial Bank was the correspondent and collecting agent at Knoxville of the National Bank, and the usual course of dealings was to enter the amounts collected to the credit of the National Bank, and to send the credit balance at the end of the month to New York according to instructions. If the note in controversy had been altogether on third persons, it is very certain that a mere entry of the amount on the books of the bank to the credit of the National Bank, without any actual collection of the money, would not ordinarily release the parties to the paper. On the other hand, if the note had been executed by the Commercial Bank alone and had been sent to it "for collection and credit," the passing of the amount of the note at maturity to the credit of the

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National Bank would ordinarily have been a good payment, for it would have been all that the bank could do under the instructions. The question then is narrowed down to this : Does the fact that there were other parties on this paper, who were there for the accommodation of the Commercial Bank, or the condition of the bank at the time, change the result ?

The authority of the bank was to collect, which necessarily meant that it might collect from any party bound upon the note. It might therefore collect from itself precisely as it would have done if it had been the only party liable. It was further directed what to do with the money collected, namely, to place it to the credit of the National Bank on its books. If therefore it then had the money with which to pay, and did actually appropriate it in the mode prescribed by passing it to the credit of its correspondent, it is difficult to see how the result could be otherwise than a payment of the debt and a release of the accommodation sureties. Dan. Neg. Inst., § 1221. The proof is that it did have the money with which to pay, and although insolvent continued to do business for that and the following day. The entry of the credit was, under the direction given, as effective as if a depositor had brought in on that day the check of another customer and had it entered to his credit. The bank may be said to have acted in bad faith, in view of its actual condition, to both classes of customers, but its action would be good nevertheless, and the loss would fall upon the party dealing with it. *Eyles v. Ellis*, 4 Bing. 112.

The decree of the chancellor will be reversed, and the bill dismissed with costs.

Decree reversed.

FREEMAN, J., dissented.

POSS v. WESTERN ASSURANCE COMPANY.

(7 Lea, 704.)

Insurance — fire — condition — "cease to be operated."

A policy of fire insurance, issued on a manufactory, conditioned to be void if the premises become and remain for thirty days unoccupied, or "cease to be operated," is not avoided by a temporary cessation occasioned by the prevalence of yellow fever.

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ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

De Witt & Shepherd, for Poss.

Barton & Son, for Company.

COOPER, J. The Chattanooga Chair and Furniture Factory, a corporation, took out a policy of insurance for six months from May 6, 1878, in the Western Assurance Company, for \$1,000 against loss by fire, on its boiler, engine, machinery, tools, etc., in a building in the city of Chattanooga in which the corporation was manufacturing furniture. The loss was, by the terms of the policy, to be paid the plaintiff, P. Poss. The property insured was destroyed by fire on October 19, 1878. This action was brought upon the policy to recover the insurance money. The policy provided that it should become void "if the premises become unoccupied and so remain for more than thirty days without the assent of the company indorsed thereon; or if it be a manufacturing establishment, running in whole or in part over or extra time, or running at night, or if it shall cease to be operated without special agreement indorsed on this policy."

The defendant pleaded to the declaration, among other pleas, that one of the conditions of the policy was that it should become void if the manufacturing establishment, the property insured, shall cease to be operated without the special agreement of the insurance company indorsed on the policy, and that the operation of the said manufacturing company did cease without the assent of the defendant. The plaintiff filed to this plea a replication that the manufacturing establishment was not operated by reason of the prevalence of an epidemic of yellow fever at Chattanooga, proclaimed and prevailing on the — day of October, 1878, and from the — day of — until it was consumed by fire, and that before it ceased to be operated the agent of the insurance company at Chattanooga had left the city to escape the epidemic, and plaintiff made unsuccessful efforts to ascertain where he had gone, to give him notice that the operation of the factory had ceased, and to procure the assent of the insurance company on the policy. The defendant demurred to the replication, assigning as causes of demurrer — 1st, that the parties had made no exception in the contract on account of epidemics; and 2d, that the replication does not show that the manufacturing company had not

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ceased before the breaking out of the yellow fever, and remained stopped for more than thirty days. The Circuit judge sustained the demurrer. Issue having then been joined on a traverse of the plea, it was agreed by the parties that the court should find the issue in favor of the defendant, it being admitted by the plaintiff that said factory ceased to be operated, as in said plea alleged, for eleven days prior to the burning, and that the court should render judgment accordingly. It was further agreed, that if upon appeal in error this court should sustain the holding of the Circuit judge on the demurrer, then final judgment affirming the judgment should be entered; but if the court should be of opinion that the ruling of the Circuit judge on the demurrer was erroneous, then the judgment should be reversed and the cause remanded, with leave to the defendant to rejoin and plead to issue on said special replication, and for a trial on all the issues joined in the cause. The Circuit Court found the issue on the particular plea in favor of the defendant, upon the admission of the plaintiff that the factory ceased to be operated, without the consent of the defendant, for eleven days before the loss by fire, and rendered judgment accordingly. The plaintiff appealed in error.

The second cause of demurrer is clearly not well taken. The replication sufficiently avers that the cessation of the manufactory to be operated was by reason of the prevalence of the yellow fever, that the fever was proclaimed and prevailed as an epidemic in October, 1878, and so continued until the property insured was consumed by fire. The real contest is over the first cause assigned, that the parties had made no exception in the contract on account of epidemics.

The point which the parties desire to have determined which has been argued before us and which is, though inartificially, made by the pleading, is whether under the terms of the policy, a temporary cessation of the operation of the chair and furniture factory of the insured by reason of the prevalence of the yellow fever in epidemic form would avoid the policy. In other words, whether the condition of the policy that it shall become void if the manufacturing establishment insured "shall cease to be operated," applies only to a permanent and not a temporary cessation of the operations of the establishment. And we are very clearly of the opinion that the policy contemplates, in this connection, only the permanent ceasing to be operated. The language is "cease to be operated." If the

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letter of the contract be alone looked to, the cessation of work on Sunday, the stoppage of operations by the necessity of cleaning out the boiler, by an accident to the machinery, or by a strike of the hands, might be held to vitiate the policy. Of course the parties never contemplated such a construction of their words, nor has the argument submitted on behalf of the defendant gone to that length. But if a temporary cessation to operate the establishment, by reason of these and other common occurrences, would not avoid the policy, it can scarcely be successfully maintained that a temporary cessation occasioned by the visitation of providence in the form of a deadly epidemic shall have a greater effect. The whole clause of the policy which we have quoted above shows that the parties contemplated a permanent cessation of operations. The language used is the language of the insurance company, and must be taken most strongly against the company whenever it admits fairly of two constructions. It could never have been intended to apply to a ceasing to operate occasioned by the usual incidents to the business, among which would be the impossibility of procuring operatives temporarily for any cause. The clause in question moreover probably exclusively applies to an insurance of the building in which manufacturing is carried on, and not to an insurance of the boiler, machinery, etc., as in the case before us.

The Circuit judge erred in sustaining the demurrer to the replication, and the judgment must be reversed and the cause remanded for further proceedings.

Judgment reversed.

BOWEN V. STATE.

(9 Baxt. 45.)

Criminal law — false pretenses — "ordinary prudence."

The defendant falsely represented to B., an ignorant negro, that he was a practicing physician, and that he had restored sight to a blind man; that B.'s dwelling-house was infected with poison; that the poison was in the bed of B.'s grand-daughter (who was then and there lying sick), and that she was poisoned, and that he could remove the poison for pay; whereupon B. paid him money to remove it. *Held*, false pretenses, although they might not have been credited by a person of greater prudence and intelligence. (*See note, p. 75.*)

CONVICTION of false pretenses. The opinion states the case.

B. M. Burrow, for Bowen.

Attorney-General Heiskell, for State.

TURNER, J. The substantial averments of the indictment are : "The plaintiff in error represented himself to be a practicing physician ; that he had restored sight to Ned Williams, a blind man ; that he represented to the prosecutor his house and residence were infected with poison ; that poison was in the bed occupied by the grand-daughter of the prosecutor ; that said grand-daughter was the person poisoned. He proposed to find the poison and remove it for a valuable consideration to be paid to him by the prosecutor ; the prosecutor relying upon these false and fraudulent representations, and believing them to be true, paid to the plaintiff in error the sum of \$22," etc.

The proof is, the plaintiff in error went to the house of the prosecutor in company with a confederate and said he was a "Chickasaw doctor," going about doing good ; said "somebody seems to be sick here ;" prosecutor replied, "yes, my grand-daughter ;" plaintiff in error looked at her and said she was poisoned, that she had poison in her bed, etc., "but you do not believe it, you are hard to believe ; I will show you how a person can poison another without coming near them." He took a hat and put it on a table, walked back to the back part of the room and told the prosecutor to raise the hat and see how many pieces of paper were under it ; prosecutor raised the hat and there were none ; plaintiff in error told him to put the hat down again, he did so, and was told to look, which he did, and found four pieces of paper under it. This was repeated, and the next time three pieces of paper were found. These things were done several times.

He then said, there is poison about your house and I can find it, told prosecutor to take up a brick out of the hearth, which he did, and found a little ball mixed with hair. Plaintiff in error then went to the bed of the grand-daughter and asked for a pair of scissors, told the grand-daughter to cut a hole in the tick and feel amongst the feathers, she did so, and found a ball similar to the one found in the hearth ; the prisoner said this was the poison in her bed that was affecting her. He then said he was doing good amongst the

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colored people ; that he had five hundred cases : that he had just been over to see old Ned Williams and had cured him of blindness ; the prosecutor knew Ned Williams and knew he was blind. The confederate said, "yes, I was over there with him, and Ned Williams is all right." Prisoner said to prosecutor, "old man, you have enemies ; you do not know the white people are better friends of yours than the colored people ; your own people are your enemies ; you have had bad luck, have you not ?" Prosecutor said he had lost his wife and his hogs. Prisoner said, "yes, your wife was poisoned ; that he could give me a thing that would tell me when my enemies were about, if I fed it and talked to it right ;" prosecutor asked what he would charge ; prisoner said ten dollars, which was given. Prisoner then took out a bottle filled with a white fluid ; the bottle had a rag tied to one side of the neck, a small substance in the rag. Prisoner said this is a "Jack," he can talk, you will have to feed him out of the bottle. The way he talks is by knocking three knocks for yes, two for no ; he asked "Jack" if prosecutor had enemies, Jack answered yes, etc. Prisoner told prosecutor he would have to cross the ten dollars with two for luck, this was done ; prisoner said, "old man, feed Jack and talk to him right, and he will talk for you."

Prisoner's visits, representations and legerdemain were repeated until he had obtained \$74.

The indictment is based on section 4701 of the Code, the act of 1829, in the words : "Every person who by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person personal property, or the signature of any person to any written instrument, the false making of which is forgery, shall on conviction be imprisoned in the penitentiary not less than three nor more than ten years."

The prisoner was convicted, sentenced, and has appealed to this court.

To the first objection, that the averments of false pretenses in the indictment are negatived thereby, we cannot agree. The indictment, under the old and technical rules of pleading in criminal causes, might be subject to criticism, but not so under the present practice in Tennessee.

It contains every element necessary to constitute the crime, distinctly notifies the defendant of the offense with which he is charged,

and clearly negatives the truth of the assigned false pretenses upon the credit of which the money was obtained.

It is insisted that the false pretenses complained of were not such as would be credited by a person of ordinary caution. We are aware that such language is used in some of the cases passed upon by this court. This restriction upon the operation of the statute is not, in our opinion, authorized by its language.

The object and purpose of the law is, to protect all persons alike, without regard to the single capacity to exercise ordinary caution, a condition of mind very difficult of definition, and certainly of very different meaning under the various circumstances that may surround the person supposed to exercise it. Thus, a child entrusted with a watch, money or other valuable, to be borne to an artificer, merchant or friend might be induced by the most flimsy and self-apparent falsehoods, to part with it; still, if these representations were of a character to secure the credit of the child and deprive it of the possession of the goods, however absurd such representations might seem to the more mature and experienced, yet it would be such false pretenses by one person to another as deprived that other of his personal property, as contemplated by the letter and spirit of the law.

A man of the country, unacquainted with the vices incident to a city, may be and often is cheated out of his effects by tricks and means that would not for a moment deceive him who was accustomed to the society in which such things so frequently occur, although he may have less strength of mind than the former.

If "ordinary caution" is to have its influence in the application of the law, it must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and conditions of life of the person practiced upon. The question is, what caution is he capable of exercising?

The main object of the law is to protect the weak against the strong, the inexperienced and unsuspecting against the experienced and vicious.

There can be no rule of law caring more for the protection of the wise and cultivated than for the foolish and unlettered. It is not required that one should exercise more caution and prudence than nature has given him. Here we have the negro who has but recently had conferred upon him the right of citizenship; every presumption is that he is ignorant; we know he is naturally superstitious,

and it is apparent from the whole record and almost every part of it, that the prisoner had completely studied his nature and knew exactly at what points in his character and natural disposition to attack him. He represents himself as the peculiar and especial friend of the negro race, giving his whole time to the promotion of its welfare, health and happiness, and to prove to the satisfaction of his intended victim the truth of his professions of power, he resorts to sleight of hand performances, and executes them with such adroitness as to elude detection of the trick by the artless negro, and as would doubtless have eluded the most enlightened. These things impressed the prosecutor as miracles; he at once gave credit to the performer as inspired, and was in consequence victimized.

It is insisted there is no proof showing the falsity of the claimed superhuman power of the pretender, and therefore he cannot be convicted.

We reply, the negative is not susceptible of actual proof, but is of that class of things which bears to the intelligent mind the conviction clear and conclusive of its own falsehood. The false pretenses of power would not have deceived the strong or cultivated mind, for the reason already given, but that they did deceive an ignorant and superstitious negro is as certain as the simplest mathematical demonstration.

The negro was a "person" contemplated by the law; he exercised such ordinary caution as nature had endowed him with. He required proofs of the imposter as to his capacity to perform wonders, to the extent of drawing from him the complaint that he was hard to believe, and he only believed after frequent repetitions.

It is objected that the prosecutor stated that sometime after he was victimized he went to see Ned Williams, who told him he had not been restored to sight by the prisoner, etc., etc.

The failure to withdraw this statement from the jury was error, for which we are constrained to reverse.

NOTE BY THE REPORTER. — On the other hand, in *Com. v. Grady*, 13 Bush, 285; S. C., 24 Am. Rep. 192, where one fraudulently represented that he owned a house and lot free from incumbrance, and procured money on the faith of such representation, when in fact there was a mortgage executed by him on record against the property, *held*, not indictable, because the party had the means of detection at hand, by a visit to the clerk's office. The point is very briefly considered, and the decision is based on Wharton's Criminal Law, § 2129. As we shall see, that section ought to be read in connection with § 1188.

In *Young v. King*, 3 T. R. 98, KENTON, C. J., in defining the offense, gave "ordinary caution" as an ingredient; but ASHURST, J., said: "The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind;" and BULLER, J., said: "The ingredients of this offense are the obtaining money by false

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pretenses, and with an intent to defraud." In *Queen v. Wickham*, 10 Ad. & El. 34, DENMAN, C. J., said to counsel arguing that the fraud must be such as to impose on a man of ordinary caution: "I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?" But the decision went on another ground. In *Reg. v. Woolley*, 1 Denn. 550, the pretense was by a secretary of an Odd Fellows lodge that a member owed it a certain sum, greater than the real debt, and thus got the excess for himself. Held a legal false pretense. ALDERSON, B., said: "If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretense; for instance, that a certain church has been built, and that there was a debt still due for the building, when there was no debt due, that would be a false pretense; yet the matter might easily be inquired into and ascertained. Or take the common case: The prisoner says 'I am sent by Mrs. T. for a pair of shoes.' Is not that a false pretense? yet inquiry can be made, and after the thing has happened, usually is made, and the falsehood detected." Lord CAMPBELL said: "It seems that the legislature meant to prevent such gross frauds as may easily be perpetrated, though an inquiry might easily be made." "I entirely agree with the observation of Lord DENMAN in *R. v. Wickham*." ERLE, J., said: "It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail." In *Reg. v. Jessop*, 7 Cox C. C. 399, a conviction was affirmed where the prisoner fraudulently offered a £1 note as a £5 note, although the prosecutor could read and did not. Lord CAMPBELL said: "In many cases the party giving change would not look at the note, but would give faith to the representation of the party offering it." So in *Reg. v. Giles*, 10 Id. 41, where the defendant pretended to have power to bring back the prosecutrix's husband over hedges and ditches. ERLE, C. J., said: "The pretense of power, whether moral, physical, or supernatural, made with intent to obtain money, is within the mischief of the law." In *Reg. v. English*, 12 Cox C. C. 171, a conviction was sustained where the defendant falsely represented the soil of a field to be fit for making bricks and that he had made bricks from it, although the prosecutor himself inspected the field.

In *People v. Johnson*, 12 Johns. 201, the ingredient of "ordinary caution" was in a general way adopted from Lord KENYON, but the case itself showed a pretense "very naturally calculated to deceive and impose upon the seller." The same is true of *People v. Haynes*, 11 Wend. 557. In *People v. Crissie*, 4 Den. 525, JEWETT, J., *obiter*, said: "Though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still I do not think it (the statute) should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand. The object of the statute, it is true, was to protect the weak and the credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the representation to be an artfully contrived story which would naturally have an effect upon the mind of the person addressed—one which would be equal to a false token or a false writing—an ingenious contrivance of unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard." In *People v. Stetson*, 4 Barb. 151, MAYNARD, J., said: "No man could suppose that he could procure a discharge from a warrant for felony by delivering money or goods to the officer holding the warrant." But the decision went on another ground. In *People v. Williams*, 4 Hill, 9, the defendant falsely pretended that a mortgagee was about to foreclose, and thus obtained the mortgagor's signature to a deed. The court said that it would seem that in attempting to defraud another he had himself been defrauded. But whatever the fact is in this particular, there can be no doubt that an exercise of common prudence and caution on his part would have enabled him to avoid being imposed upon by the pretenses alleged, and if so, the case is not within the statute." On the other hand, in *People v. Sully*, 5 Park. 142, it was held within the statute falsely and fraudulently to represent that a mortgage was a first lien. The court distinguished the common-law offense of cheating. The court said: "It is not necessary that the pretense or representation should be such that common prudence or ordinary care could not have guarded against it. * * * It is sufficient if it be such (and such it must be) that if true,

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it would naturally and according to the motives which in the affairs of life influence the honest mind, directly lead to the result alleged. All men are not equally prudent or cautious, and the statute was passed for the protection of the weaker and more credulous and unsuspecting part of mankind." The *Babcock, Williams, Stetson and Johnson* cases were distinguished; Lord DENHAM's observation in the *Wickham* case was approved, and the court continued: "The character and nature of the pretenses, and how calculated to deceive the prosecutor, the prosecutor's habits and mental capacity, are all proper to be considered by the jury in determining whether the prosecutor was deceived by them, and whether they were the operative cause of his parting with his property. An inexperienced youth or a feeble old man might be induced to part with his property by false pretenses, particularly if made by a person in whom he placed mistaken confidence, which would not engage the attention of a man of ordinary sagacity and prudence, and which a sharp and experienced man would see through at a glance. Which stand most in need of the protection of the law? and is not the law made for the weak? Take two men of 'common prudence and sagacity,' and the one is duped by that which would have obtained no credit from the other, and they each wonder at the credulity of the other." The same view was taken by the chancellor, in *People v. Haynes*, 14 Wend. 545, but the decision went on another ground. The chancellor inveighed against "leaving the honest and unsuspecting to protect themselves as they may against the arts and deceptions of those who intentionally defraud them of their property by wilful and corrupt lying and other false pretenses, calculated to deceive that class of citizens which is most in need of the protection of the law." Senator TRACY, on the other hand, thought this "not only an incorrect but a mischievous construction of the statute, which proposes to protect property from loss by impositions which the owners can easily guard against."

In *Bonnell v. State*, 64 Ind. 498, the prosecutor parted with a sum of money to the defendant, a stranger, on his false and unsupported representation that he was a certain person, field, not to warrant a conviction. The loss "was the result rather of his own negligence in the transaction than of any false pretenses," etc. In *Jones v. State*, 50 Id. 473, there was a false pretense of agency for a firm in another State. The court said: "We think the pretenses alleged in the indictment were sufficient to deceive a person of ordinary caution and prudence. It is true that many persons would not have been deceived thereby. They might, by reason of their long experience and greater shrewdness, have detected the fraud, or having their suspicions excited, they would have communicated with the firm in Cincinnati. But laws are not made for the protection of the shrewd and vigilant business man only, but for the entire community. In the enactment of criminal laws, the legislature adopts, as the standard of intelligence, neither the highest nor the lowest, but the medium. The law only requires the exercise of ordinary caution and prudence. Business could not be transacted without placing confidence in the representations of persons engaged therein. While the law does not encourage blind confidence, it does not expect those engaged in the ordinary affairs of life to possess the shrewdness and cunning of the practiced detective. The question therefore is, in such a case as the present, what would a man of ordinary intelligence and caution have done under the facts and circumstances surrounding this transaction? Would such a man have believed and acted upon such pretenses? If he would, the case is made out."

In *State v. Estes*, 46 Me. 150, an indictment for false pretenses as to a watch pawned by the prisoner, alleged that he represented that it was his wife's, but did not allege that he represented himself as authorized to pledge it. *Held*, bad; "if the pawnor is chargeable with turpitude, the pawnee is equally so with stupidity. The government cannot protect the one nor protect the other." But this was a case where there was no substantial false pretense, and the question of ordinary prudence as to a false pretense did not arise.

In *State v. Mills*, 17 Id. 311, the court say: "If the construction should be narrowed to cases which might be guarded against by common prudence, the weak and imbecile, the usual victims of these pretenses, would be left unprotected."

In *State v. DeHart*, 6 Baxt. 222, the defendant falsely pretended, as a means of getting credit, that he had a certain quantity of property in his office liable to his creditors. *Held*, not a case for conviction. "Common prudence and caution upon the part of the prosecutor should have required him to resort to other information as to these facts." But in *McCorkle v. State*, 1 Cold. 333 false representations of agency were held sufficient, where

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the prosecutor knew the defendant had been in the employment of the alleged principal. In *Delaney v. State*, 7 Baxt. 38, it was held that "there should be something in the nature of the transaction itself, to show that a person of common prudence and caution could not have been imposed upon thereby." But on similar facts to those in *McCorkle v. State*, there was the like holding.

In *Com. v. Henry*, 22 Penn. St. 253, the pretense was of holding a warrant for the arrest of the prosecutor's daughter. Held, within the statute, the court observing "Nor is it less a false pretense because the party imposed on might, by common prudence, have avoided the imposition." Citing the *Wolley* case.

To the same effect *Re Greenough*, 81 Vt. 279; *Colbert v. State*, 1 Tex. App. 314.

In *State v. Simpson*, 3 Hawks. 620, the court distinguish the North Carolina statute from that of Georgia, and hold that there must be some contrivance calculated to impose on the credulity of ordinary men. They say *obiter*, "even that statute would not extend to this case," which was a case of a mere naked lie.

In *Smith v. State*, 55 Miss. 513, the court observed: "The fifth instruction asked for the defendant declares that no conviction can be had unless the pretense was such as would have deceived, and was likely to have deceived, a man of ordinary prudence. No facts proven warranted such a charge, nor do we believe the principle announced a sound one, though the authorities upon it are conflicting. The statute is made for the protection of the weak and unsuspecting as well as of the wary and cautious, and the cheat who has defrauded his victim by a designed and fraudulent misstatement as to an existing fact, should not be allowed to escape punishment, upon the ground that care and prudence would have protected the party from its consequences. It may be, as said by some of the authorities, that where the carelessness is so gross that the law will impute consent to the seller, no guilt would be incurred. 2 Whart. Cr. Law, §§ 2128-2131; *Norton v. Commonwealth*, 11 Allen, 266."

In *People v. Pray*, 1 Mich. 69, the requisite of common prudence was discarded, rejecting the doctrine of the *Williams* case.

In *Coven v. People*, 14 Ill. 348, the court below was asked to charge that common prudence and caution were essential, but refused, and said, "the jury will consider the evidence that complainant was a farmer and knew nothing about such articles"—a watch. This was sustained, the court observing: "In determining the criminality of false pretenses used by the prisoners, it was necessary for the jury to consider the ability or capacity of the person to whom they were addressed to detect the falsehood. Should an article, the essential value of which consisted in its color, be offered to a person fully possessed of the sense of sight, and with every opportunity of inspection, with the pretense that it was white, when in fact it was black, under such circumstances the false pretense might be very innocent because it was not calculated to deceive; while the same pretense made to a blind person would be calculated to deceive, and might subject the party to punishment."

In *Burrow v. State*, 12 Ark. 65, the pretense was that there was a conspiracy to seize and deprive the prosecutor of a slave, by means whereof the prosecutor was induced to convey the slave to the defendant. The court said: "It was not the intention to convert every fraud which might fall within the cognizance of a court of equity into a criminal offense, and to protect every individual from the consequences of his own credulity, imprudence or folly; but it was designed to extend no farther than to embrace such representations as were accompanied with circumstances fitted to deceive a person of common sagacity and exercising ordinary caution." Citing the *Williams* case, and Senator Tract's observations in the *Haynes* case. But in *Johnson v. State*, 36 id. 242, it was held to be "as criminal, certainly, to defraud the unwary and unsuspecting as the prudent and cautious," and the ingredient of "ordinary prudence or caution" was rejected.

In *State v. McConkey*, 49 Iowa, 499, the court said: "Appellant complains of the refusal of the court to give the following and like instructions, to wit: 'Before you can find the defendant guilty you must find that Hurst exercised ordinary prudence and diligence to inform himself of the truth or falsity of representations made by defendant as to character, location, number or description of the lot or land for which he was trading with the defendant.' We think the instructions were properly refused. The defendant took Hurst to a locality in the city of Des Moines, stepped and marked off by stakes at the corners a lot, represented that he owned it, proposed to sell it to Hurst, and told him that it was lot

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one, block two, of Van's addition. There was nothing unreasonable or improbable in this representation. It was made for the purpose of being believed by Hurst, and defendant has no right to complain that Hurst took him at his word and relied upon the statement made. If the representation had been absurd or improbable, or Hurst had had the means of detection at hand, a different rule might prevail; but no examination of the lot would enable Hurst to determine that its number was not that represented, nor that the lot bearing that number was in the middle of Coon river. An examination of the town plat would be necessary for this purpose, and even then, without the possession of some special skill and knowledge of the subject one would not be able to locate upon the ground a lot described by number on the plat. See Whart. Crim. Law, §§ 2123-9."

In *State v. Montgomery*, 56 Iowa, 195, the prosecuting witness had been defrauded on a railroad journey by the defendant and an accomplice, who were strangers to him, by the familiar "confidence game" of persuading him to cash a worthless check. The court said: "We can conceive that alleged false pretenses might be so frivolous as to preclude the supposition that any person could be misled by them and thereby induced to part with his money. But this is certainly not such a case. The court was fully justified in submitting the question as to whether the defendant obtained Frizzell's money by the false representations. It is true that these representations were not such as would probably have induced a shrewd and experienced man to part with his money. The criminal classes, it may be presumed, do not usually approach such men with such methods. But they were well calculated, we think, to mislead and defraud some men. At all events it was a fair question for the jury as to whether they believed that Frizzell was defrauded by them, and this question was fairly submitted. If Frizzell was defrauded by the false pretenses, they are not to be regarded as frivolous as to him. * * * The jury was entitled to consider Frizzell's age, etc., in determining whether he was actually misled and defrauded. If he was thus defrauded the jury would not have been justified in regarding the false pretenses as frivolous, and acquitting upon that ground. We ought certainly to adopt no rule which should make the young, the inexperienced, and the half-witted, the legitimate prey of criminals. The defendant complains that the instructions given ignore the idea that Frizzell was bound to make any effort to learn the truth of the statement made to him. In support of his position that such idea should not have been ignored, i.e. cites *State v. Young*, 76 N. C. 258. In that case the court said: "A false statement that a house and lot are unincumbered, when in fact they were subject to a recorded mortgage, is not a false pretense within the meaning of the statute, because the party defrauded had the means of detection at hand, and might have protected himself in the exercise of common prudence. But that case bears very little resemblance to the case at bar. In that case there was an actual borrowing of money, and a bona fide intent, doubtless, to repay. The false representation went merely to the condition and value of the security. In the case at bar the jury was justified in believing that the borrowing was a mere pretense."

(A wrong reference is given above. The case last cited states no such doctrine, and contains no such language.)

In *Buckalew v. State*, 11 Tex. App. 353, the false pretense was that the prosecutor had killed the defendant's hog; whereby the defendant fraudulently obtained money from the prosecutor to settle the case. The court said: "In *Culbert v. State*, this court said: 'There has been a conflict of opinion as to whether the false pretenses, to be indictable, should be such as would necessarily impose upon a man of ordinary prudence. In New York, Pennsylvania, Arkansas, and some of the other States, it has been held that a representation, though false, is not within the statute making it an offense to obtain money or other property under false pretenses, unless calculated to deceive persons of ordinary prudence. In Pennsylvania and New York such is no longer the law, it being now held that it is not less a false pretense that the party imposed upon might by common prudence have avoided the imposition. We think that it is generally received both in England and the United States as the law, that the pretense need not be such an artificial device as will impose upon a man of ordinary prudence or caution; that the pretense need not be such as cannot be guarded against by ordinary caution or common prudence.' 1 Tex. Ct. App. 314. But even though ordinary caution and common prudence are not required in the detection and avoidance of the imposition, yet we apprehend that there has

been no change in the rule, so well founded in common sense and law that 'where the pretense is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act.' *Comm. v. Hutchison*, 2 Para. (Pa.) Sel. Cas. 309; *Comm. v. Hickey*, id. 317; *Comm. v. Poulson*, id. 326. In the case before us Cooper, of all persons in the world, best knew whether he was guilty or not of killing Buckalew's hog. Let him take either horn of the dilemma. If he was guilty, he was not deceived, and representations could in no wise be denominated false or fraudulent. If he was not guilty, then he must have known that fact equally as well, and no statement or representation of Buckalew could possibly have deceived or imposed upon him with regard to that matter. Where the knowledge of a fact is within a man's own breast, he cannot be deceived by another person's falsely representing the fact to him; he knows at the instant that the statement made is either true or untrue."

Mr. Bishop says (2 Cr. L., §§ 433, 436): "But must the pretense be such as is calculated to mislead men of ordinary prudence? Some of the other cases lay down the doctrine that it must. But in reason, and it is believed, according to the better modern authorities, a pretense calculated to mislead a weak mind, if practiced on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind, if practiced on the latter." "Practically, it is impossible to estimate a false pretense otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance; it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth, there is not one who would not be pronounced to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath could not be done by a man of ordinary judgment and discretion. These facts being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretense, an argument, an inducement to action, in any other scale than that of its effect."

Mr. Wharton says (2 Cr. L., § 1188): "The prosecutor's capacities and opportunities must be considered in determining his culpability." "The question of carelessness is to be determined from the prosecutor's standpoint. To obtain from a jeweller money by exhibiting a spurious jewel might not be within the statute, while it would be within the statute for the jeweller to offer the same spurious stone to an ignorant customer." "Gross carelessness is to be determined by the capacity of the prosecutor. The weaker the mind, the less stringent the rule."

We are inclined to think that no test of ordinary prudence and caution should be applied; that the doctrine of contributory negligence is no more applicable than in a case of seduction. At all events, the authorities warrant this conclusion: that there is no hard and fast rule derived from the caution of prudent men or the average prudence and caution of mankind, but that the man defrauded must be judged by his capacity, his opportunities of investigation, and the circumstances. We do not think any negligence should weigh if the man is deceived; but certainly no negligence should avail unless so gross as to amount to an apparent consent.

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(9 Baxt. 53.)

Criminal law — larceny — dog.

A dog is subject of larceny, where personal property is defined as "goods and chattels." (See note, p. 88.)

INDICTMENT for larceny. The opinion states the case. The indictment was quashed below.

Attorney-General Heiskell, for State.

B. M. Burrough, for Brown.

SNEED, J. This case presents the question, whether under the laws of this State a dog is the subject of larceny.

At the May Term, 1876, of the Criminal Court of Shelby county, the defendant was indicted for stealing a dog of the value of ten dollars, the property of the prosecutor, John E. Spicer. The court being of opinion that the dog is not the subject of larceny, on motion quashed the indictment, and the State appealed.

The learned judge, in thus ruling, has but reiterated the immemorial doctrine of the common law upon this subject, and such must be accepted as the law this day unless it has been abrogated by statute. The common-law doctrine is thus given in the early books: "As to those animals which do not serve for food, and which the law therefore holds to have no intrinsic value, as dogs and all other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as the offense of stealing them amounts to larceny." 4 Bl. Com. 190; Hale P. C. 512; 1 Bish. Cr. Law, § 787. Thus it was said "a man may have property in some things which are of so base a nature that no felony can be committed of them, as of a bloodhound or mastiff." 7 Coke, 18 a; *Findlay v. Bear*, 8 S. & R. 571; 4 B. 236; 12 H. 8, 3; 18 id. 8, 2. The definition of larceny at common law and under our statute is the same: "the felonious taking and carrying away the personal goods of another." 4 Bl. Com., § 230; Code Tenn., § 4677. The old doctrine of the common law was abrogated by the

statute of 10 George III, ch. 18, which made the stealing of dogs punishable. While the old doctrine prevailed the common law furnished the general examples of such goods, chattels or property as constituted the subject of larceny, and from this category the animal in question was excluded. It would seem difficult to give a sound reason for the old doctrine, in view of the concession that dogs are property, and of the indisputable fact that they are sometimes esteemed of great value. The words "goods and chattels" at common law include all personal property in possession, and if unrestrained in a will they will pass all personal property. 12 Coke, 1; Co. Litt. 118; 1 Atk., ch. 182; Williams Ex'rs, 1014. Thus it is said that "hounds, greyhounds, spaniels and the like are capable of being transmitted like other personal chattels, and as they may be valuable, and may serve for both profit and pleasure, they shall go to the executors and administrators. "And why not?" said Mr. Justice DODDRIDGE, "for although hounds, greyhounds and spaniels be, for the most part, things of pleasure, that hindereth not but that they may be valuable." Went. Off. Ex. 143; 1 Williams Ex'rs, 591. If it be the purpose of the criminal law to protect the property of the citizen in that which is useful and valuable, as well as to punish crime, we can scarcely characterize a doctrine as otherwise than simply arbitrary and without sound reason, which would exclude from the protection of the law an animal, which in its varied species, is possessed of so many elements of value and utility to the human family. But as we have said, the doctrine of the ancient law on this subject is still the law here unless the statute has changed it. We have seen that larceny by our law is the felonious taking and carrying away the personal property of another. The terms "personal goods" and "personal property," are convertible, and in their general sense mean the same thing. The words "personal property," by our statute of interpretation mean "goods and chattels." The dog is personal property, and if of any value is under our statute the subject of larceny. There is a conflict of ruling among the State courts on this subject. The Supreme Court of Alabama has decided that the dog is not the subject of larceny, but that court we suppose had no statutory definition of "personal goods" or "personal property," and referred to the common law for the definition. "We think it safest," says the court, "to refer to the common law for the meaning of the words 'personal property' as used in the statute, and that law declares that dogs

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are not such personal property as is the subject of larceny." *Ward v. State*, 48 Ala. 161; s. c., 17 Am. Rep. 31; *Harrington v. Miles*, 11 Kans. 480; s. c., 15 Am. Rep. 355. In the case of *People v. Campbell*, 4 Parker Cr. 386, it was held that "a dog, though property, so as to enable the owner to maintain an action of trespass for an unlawful taking, was not the subject of larceny at the common law, but under the provisions of the statute declaring all personal property the subject of larceny, an indictment for stealing a dog may be sustained."

We need not go very far for a sound reason for this holding, and we think the solution of the question in this State also depends upon the statutory definition of "property" or "personal goods," as used in our Criminal Code, which makes the felonious taking and carrying away thereof larceny. A dog, if he have an owner, is personal property, and if of any value is the subject of larceny.

Reverse the judgment and remand the case for trial.

Reversed and remanded for trial.

McFARLAND, J., dissented.

NOTE BY THE REPORTER. — Dogs are generally held not the subject of larceny, being "base." *State v. Holder*, 81 N. C. 537; s. c., 31 Am. Rep. 517; *State v. Lymsus*, 26 Ohio St. 400; s. c., 20 Am. Rep. 773; *Ward v. State*, 48 Ala. 161; s. c., 17 Am. Rep. 31. But otherwise when they are taxed. *People v. Malony*, 1 Park. 598; *Mayor v. Meigs*, 1 McA. 53; s. c., 29 Am. Rep. 575, *Ex parte Cooper*, 3 Tex. Ct. App. 439; s. c., 30 Am. Rep. 132; *Harrington v. Miles*, 11 Kans. 480; s. c., 15 Am. Rep. 355.

In *Mullaly v. People*, 86 N. Y. 365, the court said: "At common law the crime of larceny could not be committed by feloniously taking and carrying away a dog. Whart. Cr. Law (4th ed.), § 1755; 4 Bl. Com. 235; 1 Hale Pl. Cr. 510; Coke's Third Inst. 109. And yet dogs were so far regarded as property that an action of trover could be brought for their conversion, and they would pass as assets to the executor or administrator of a deceased owner. Bac. Abr., Trover, D.; 1 Wms. on Exrs. (6th Am. ed.) 775.

"The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history (2 Motley's Dutch Republic, 398); and the faithful St. Bernards, which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travellers, the claim that the nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent.

"In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential.

"This common-law rule was extremely technical and can scarcely be said to have had a sound basis to rest on. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. Lord Coke in his Institutes, cited above, said: 'Of some things that be *feræ nature*, being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons to make them fitter for great employments, as all kind of falcons and other hawks, if the party that steals them know they be reclaimed.'

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"In the reign of William I, it was made grand larceny to steal a chattel valued at twelve pence or upwards, and grand larceny was punishable by death, and one reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit that a person should die for them; and yet those ancient law-givers thought it not unfit that a person should die for stealing a tame hawk or falcon.

"The artificial reasoning upon which these rules were based is wholly inapplicable to a modern society. *Tempora mutantur et leges mutantur in Ulin.* Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property.

"If the common-law rule referred to ever prevailed in this State, we have no doubt it has been changed by legislation."

[That "personal property" in the statute of larceny is defined to mean "goods, chattels," etc.]

"In view therefore of all the circumstances to which we have alluded, and for all the reasons stated, we are of opinion that the law-makers intended, by the legislation contained in the Revised Statutes, to change the common-law rule as to stealing dogs, if it was before recognized as having force in this State; and to this effect are the only judicial decisions upon this subject which have been rendered in this State so far as they have come to our knowledge. *People v. Malony*, 1 Park. Cr. 598; *People v. Campbell*, 4 Id. 386; see also, *People ex rel. Longwell v. McMaster*, 10 Abb. (N. S.) 182.

"Our attention has been called by the counsel for the prisoner to certain decisions in other States, which tend to sustain his contention. *Findlay v. Bear*, 8 S. & R. 571; *State v. Lynum*, 26 Ohio St. 400; s. c., 20 Am. Rep. 772; *State v. Holder*, 81 N. C. 527; s. c., 31 Am. Rep. 517; *Ward v. State*, 48 Ala. 161; s. c., 17 Am. Rep. 31. But so far as those cases announce views in conflict with those above expressed, we are not disposed to follow them." FOLGER, Ch. J., dissenting.

In *Kneeman v. State*, 77 Ind. 132, under a statute of malicious trespasses, a conviction of killing a dog was sustained. The court held that a dog is an animal of value, inasmuch as dogs are taxed.

MCCALLUM V. JOBE.

(9 Baxt. 168.)

Negotiable instrument — evidence to vary indorser's liability — merger — collateral security.

The defendant indorsed to C. a promissory note, which C. afterward indorsed to the plaintiff. At the time of the transfer to C. the note was secured by a mortgage to the defendant, and C. had foreclosed a subsequent mortgage of his own on the same premises, and bought in the property. *Held*, that evidence was competent to show that it was agreed between the defendant and C., at the time of the transfer of the note to C., that C. was buying to relieve his property of this incumbrance, and was to be subrogated to all the defendant's rights, and that defendant was not to be in any manner liable,* and also *held* that there could be no recovery on the note, as the debt was merged, the transfer of the note carrying the mortgage with it.

* See *Owings v. Baker* (54 Md. 83), 39 Am. Rep. 853.

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ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

Wilson & Beard, for complainant.

Jarnagin, for defendant.

SNEED, J. The action is brought upon a promissory note for \$5,000, executed by C. Pfannensteihl to the defendant, S. M. Jobe, on the 4th August, 1866, due at twelve months after date and indorsed by Jobe to W. D. McCallum, February 21, 1870, and by him to the plaintiff. At the time of the purchase of the note by W. D. McCallum the defendant Jobe had a mortgage upon valuable real estate in the city of Memphis to secure it. Upon the same property W. D. McCallum had foreclosed a subsequent mortgage of his own, had become the purchaser himself, and was in possession under a deed from the trustee. The verdict and judgment below were for the defendant, and to reverse that judgment the plaintiff has appealed in error.

It was insisted upon the trial below that the liability of the defendant as indorser had not been fixed by due and lawful demand and notice, and that by the laches of the plaintiff in this respect the defendant had been discharged. In the view we have taken of the case, this question may well be ignored and pretermitted in the discussion. We may concede, for all the purposes of this decision, that the demand and notice were proper, regular and lawful, but where it is so plainly manifest upon the merits of the cause that the exact legal rights of the parties have been attained and the strict law of the case administered by the verdict, we are forbidden to reverse the judgment unless in some manner the merits of the cause have been affected by the error alleged. It is alleged as error that the court below, over the objections of the plaintiff, admitted the testimony of the defendant to the effect that when he sold and indorsed the note to W. D. McCallum, there was a distinct understanding between them that McCallum was buying to relieve his property of this incumbrance upon it, and that the defendant was in no manner to be held liable as indorser, but that the transaction was understood by both parties as a substitution of McCallum to all of Jobe's rights under his prior mortgage, which as a matter of fact was a full and ample indemnity and consideration to McCallum for his outlay for the note. This fact being established, it is most clear that it would

have been a great fraud and wrong upon the defendant to have enforced against him the collection of the note, when McCallum had already been fully reimbursed by the rescue of his estate from the valid incumbrance the defendant held upon it, and which passed to McCallum by the transfer of the note. We hold that in such a case the testimony was competent and was properly admitted.

There is a well-established exception to the rule, that parol evidence is inadmissible to alter, vary or impair the legal effect of a written contract of indorsement such as this, which we fully recognize. As between the original parties to commercial paper, or others having no superior equities, parol evidence has always been admitted to show fraud, want or failure of consideration, or that the enforcement of the contract according to its legal effect, as gathered alone from the writing, would operate as a fraud upon the defendant. And we apprehend that nothing can be found in our decisions that upon careful scrutiny conflicts with this well-established exception, where a defendant has sought to bring himself within the exception. The rule is thus strongly stated in the text books: "Notwithstanding the general rule that bills and notes cannot be contradicted in their legal effect by oral evidence, it is well-settled that they may, between the original parties, be impeached for illegality, for failure of consideration, for fraud, for want of consideration, or by showing a subsequent agreement varying the original contract, or waiving a portion of it." *Edw. on Bills*, 141. "While the legal effect of an indorsement may not in general be changed by parol proof, the rule does not exclude proof of fraud or want or failure of consideration." *Id.* 295, 296, 297.

Parol evidence may undoubtedly be given of the circumstances under which a note or its indorsement is made, in order to show a want or failure of consideration, or illegality in the transaction, or to present the defense of a fraudulent appropriation of the note to a purpose to which it was not intended, or to establish a contemporaneous agreement as to the mode of payment which has been executed in satisfaction of the debt. *Chitty on Bills*, 69, 142; *Duncan v. Gilbert*, 5 *Dutch*. 521; *Oliver v. Phelps*, *Spencer*, 180; 1 *Zab*. 597; *Chaddock v. Vanness*, 35 *N. J.* 517; *s. c.*, 10 *Am. Rep.* 258. These rules apply as between the immediate parties, or subsequent parties without superior equities. The language of the rule, says a late text writer, implies its limitation, for it does not extend to exclude evidence offered to show want or failure of consideration,

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or to impeach the original or present validity of the indorsement on the ground of fraud. Facts may always be proven by parol that tend to show that the enforcement of defendant's liability would operate as a fraud. 1 Dan. Neg. Inst., §§ 720, 722. A fine illustration of the exception is found in the case of *Hill v. Ely*, 5 S. & R. 366; 9 Am. Dec. 376, where the holder handed Hill the notes, saying, "Hill, you must indorse the notes." The defendant replied, "that is not our understanding." To which the plaintiff rejoined, "they are made payable to you, how will you convey them? You must indorse them that I may collect them." The defendant then said, "I will indorse them, but remember that I am not to be responsible for their payment." The court said the evidence went to prove a direct fraud in obtaining the indorsements or their perversion to a use never intended — a fraudulent purpose. And the testimony was held properly admitted. But aside from this question there are ample grounds upon which this verdict may be sustained, even if we concede the testimony of the defendant to have been improperly admitted, which we do not. When McCallum bought his note the mortgage of the defendant Jobe for its security was an unquestionable incumbrance upon the land, and the mortgage is conceded to have been abundant security for its payment, while the mortgagor and maker of the note was known to all parties to be utterly insolvent. Now whatever may have been the effect of Jobe's indorsement in imposing upon him a *prima facie* technical liability upon the note, it is manifest from the testimony of McCallum himself and from all the surrounding circumstances, that McCallum's paramount object in buying the note was to discharge the incumbrance and relieve his property. And we are equally well satisfied that Jobe, having full knowledge of the insolvency of the maker of the note, and having a full and perfect security in the mortgage for the payment of the whole amount of the note and interest, would not have disposed of it as he did for less than its value, losing several years of interest upon it, if he had intended that in addition to his investing McCallum with all his interest in the mortgage, he was also to be held personally bound on the note. The facts of the whole negotiation are most unimpeachable witnesses for him, and they acquit him of this great folly, and his own testimony to that effect in our judgment unquestionably interprets the true intention of the parties in the transaction. We hold that there is enough in the case, without his testimony, to show that it cannot be possible

that it was the intention of the parties that he should be bound for the payment of the note.

It is developed in the proof that Jobe's remedy under the mortgage was temporarily embarrassed by an injunction bill then pending to restrain the collection of certain separate interest notes alleged to be usurious, and the true solution of his conduct is in the fact that this transaction with McCallum was the shortest and best way for his own extrication without the greater sacrifice of a protracted delay in the foreclosure of his mortgage. What then is the legal effect of this transaction? It seems to us that the authorities are very clear to the effect that by operation of law the debt was extinguished and that there can be no recovery on the note. In such a case the sale of the note carried the security with it, and no paper title is necessary to invest the purchaser with all the benefits of the mortgage. *Cleveland v. Martin*, 2 Head, 131. It would certainly be a monstrous anomaly of wrong to permit McCallum to be first reimbursed for his whole outlay by a discharge of the incumbrance upon his land, and then to be paid the same amount by compelling Jobe to pay the note, the former being doubly indemnified and the latter losing his entire debt. The law scorns an alliance with injustice and oppression, and perhaps no case can be produced which so well illustrates the obvious justice and soundness of the principle that in such a transaction the debt is merged and extinguished by operation of law.

In support of this view we cite numerous authorities bearing upon it in divers aspects, and which we hold to be decisive of the case: 1 Hill. on Mort. 236, 251, 375, 540, 543, 504; Perry on Trusts, 318, 351; 7 Humph. 127; 5 Cow. 202; 4 B. Monr. 529; 34 Iowa, 392; Meig's R. 52; 4 Johns. 43; 15 Mass. 485; 19 Johns. 325; 2 Wash. R. P. 500; 6 Allen, 79; Johns. Ch. 128; 10 Paige, 255; 6 Yerg. 116; 8 Mass. 493; 22 Pick. 394; 2 Col. 167; 9 Humph. 726; 20 Penn. St. 284; 14 Pick. 104; 3 Johns. Ch. 53; 6 id. 417; 1 Allen, 242; 18 Ves. 384; 20 Mo. 482; 20 Mich. 9; 6 Pick. 492; 3 Cush. 554; 2 Barb. Ch. 618; 51 Ill. 331; 51 N. Y. 333; 10 Paige, 595.

Affirm the judgment.

Judgment affirmed.

COPELAND V. BOAZ.

(9 BART. 222.)

Marriage—note to induce wife's return.

A note executed by a husband to his wife living separate from him to induce her to return cannot be enforced by the wife.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Richardson & Andrews, for complainant.

Latta & Marshall, for defendant.

TURNER, J. The suit was instituted upon the following note :

“On or before the 25th day of December next I promise to pay Thos. Boaz, trustee for my wife, five hundred dollars, for value received. This June 29, 1872.

“JAMES COPELAND.”

It appears from the record, the plaintiff in error and his wife had separated, and the note sued on was executed to induce her to return.

The court struck out pleas setting up these facts and charged the jury the consideration was sufficient. In both of these rulings the Circuit judge was in error. The relation of husband and wife was in nothing changed by the separation. All the obligations, moral and legal, still rested upon them. The parties could not and did not by the separation diminish or enlarge their respective rights and duties under the law regulating the relation of husband and wife.

The most that can be made of the undertaking here will not carry it above the grade of an executory contract. A promise by the husband to pay to the wife, or to another for the benefit of the wife, without more, is a *nudum pactum*. The undertaking contravenes public policy, is promotive of separation of husband and wife, and not tolerable in law.

Judgment reversed.

*See *contra*, *Phillips v. Meyers* (38 Ill. 67), 25 Am. Rep. 295.

WATKINS V. WYATT.

(9 Baxt. 250.)

Mortgage of crop to be planted.

A mortgage of a crop to be planted is valid, even as against creditors.*

SUFFICIENTLY reported in 30 Am. Rep. 63.

POTEETE V. STATE.

(9 Baxt. 261.)

Criminal law — evidence — dying declarations of witness.

Dying declarations of a witness as to a homicide are inadmissible in evidence.

CONVICTION of murder of Jason Fussell. The opinion states the point.

S. W. Hawkins, J. R. Hawkins, and Mile Bright, for plaintiff.

Attorney-General Heiskell, for State.

FREEMAN, J. [Omitting other matters.] The next question is, whether it was proper to allow the dying declaration of Jno. Poteete, who was engaged in the difficulty, and was killed by a shot from one of the Andersons, to the effect that he fired but one shot, thus tending to fix the killing of Fussell on the defendant or his brother, as he received several fatal shots from some of the parties. We find the authorities are contradictory on this question, the earlier cases allowing such testimony, even in civil cases, as the dying declarations of a subscribing witness to a bond or a will that the papers were forged. See 1 Phil. on Ev. 232, also notes. This has long been overruled, and the author says, p. 233: "That dying declarations have been limited even in criminal cases; and the rule is now, that such declarations are generally admissible only where the death of the declarant is the subject of inquiry, and where the circumstances of his death are the subject of his dying declarations." The learned

* To same effect, *Hull v. Hull*, post.

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editors of Philips, in note to the above, says that so long as such testimony stood on the idea alone that the situation of the party, as near dissolution, was equivalent to the obligation of an oath, no reason could be given why such declarations should not be received in other cases as well as that of homicide. But he adds, "on the whole, it is plain, that the rule is one of policy and necessity arising in the particular case. It shall not be allowed to the offender to commit a homicide, and by the same act put to silence the only witness at whose mouth he may be condemned." He then adds: "Upon this view it has long been settled, by a series of cases, that declarations *in extremis* are restricted to the trial for the identical homicide which occasioned the death of the person who makes the declaration."

This court, in the case of *Hudson v. State*, 3 Cold. 359, approve this as the rule. Upon careful reflection we can see no reason to depart from it, nor why any extension of the rule should be made. Such testimony is subject to many objections and inherent infirmities. The party is not in condition, frequently, to give calm attention to the question to which he makes his statement. It is usually made in the presence of friends whose feelings are excited against the other party against whom they are to be used, and who may easily direct the dying man's attention to the points in the case bearing most heavily on the guilt of the accused, and who will most naturally leave out of view all that tend to a different view. The accused is not present, and has neither an opportunity to make suggestions or call attention to the circumstances in his favor, nor to cross-examine to show inaccuracies of memory, or expose bias from passion or prejudice.

In view of these considerations, we are satisfied the rule laid down by the authorities cited is the sounder and safer one, and that the principle on which the admissibility of such testimony should mainly rest, is the one stated, of policy, and to prevent the party from depriving the State of testimony by his own murderous act. We therefore conclude, there was error in the admission of these declarations of John Poteete against the prisoner.

[Minor matters omitted.]

It is sufficient that we find errors of law against the prisoner. It is an imperative duty to correct them, and remand the case for a new trial, which is done.

Remanded for a new trial.

RICHARDSON V. RICE.

(9 BART. 290.)

Negotiable instrument — transferred as collateral security.

A negotiable note, transferred by the payee before maturity as collateral security for an existing debt and future advances, is subject to equities between maker and payee at the time of transfer.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

W. F. Poston, for plaintiffs.

H. T. Johnson, for defendants.

DEADERICK, J. Rice, Stix & Co. recovered a judgment in the Circuit Court of Crockett county, against W. B. & H. H. Richardson, from which they have appealed to this court. The suit originated before a justice of the peace upon a note (executed by plaintiffs in error to defendants in error), and was payable at the office of Dickinson, Williams & Co., and seems to have been indorsed by Rice, Stix & Co., and delivered to Dickinson, Williams & Co., and by them transferred by delivery to the Merchants National Bank at Memphis, as collateral security for subsisting indebtedness of, and future advances to be made to Dickinson, Williams & Co., and was finally transferred to the Metropolitan National Bank, New York, for whose use this suit is now prosecuted.

The defense is, that the note was paid while held by Dickinson, Williams & Co., to them, and before its maturity. Upon the trial the defendants, amongst other things, requested the court to charge the jury that if the defendants paid the note to Dickinson, Williams & Co. before it fell due, and while they were the holders of it, and before its transfer to the Merchants National Bank as collateral security, they should find for the defendants. This, as well as all the other requests to charge several other propositions submitted by defendants, the court refused, saying to the jury that he charged the reverse of said several propositions. After the jury had retired they returned into court and asked, "If the note was paid by the

* To same effect, *Craighead v. Wells* (3 BART. 33, 35 AM. REP. 633, and note, 633.

Henderson v. Cardwell.

defendants, before due to Dickinson, Williams & Co. while they were the holders of it, how should they find?" The court instructed them that such a payment would not exonerate defendants; that unless they made the payment after the note fell due and before it was transferred by Dickinson, Williams & Co. to the Merchants National Bank, the payment would be no protection to them. In the case of *Gosling v. Griffin*, decided at this place November, 1875, JACKSON, special judge, delivering the opinion of the court, it was held that the maker of negotiable paper is not discharged if before its maturity and after its transfer, even as collateral security, he make payment to any other than the real owner. The case of *Vatterlien v. Howell*, 5 Sneed, 441, in which it was held that in such case, unless the holder gave notice to the maker of the transfer, such payment would be valid, was reviewed and overruled; and it was held "that negotiable paper taken as collateral security for pre-existing indebtedness, before maturity and before any equities exist against it, must stand upon the same footing as the transfer of over-due paper. The holder in neither case is considered a holder for value in due course of trade under the law merchant. Both are subject to all equities existing at the time of the transfer, but neither is subject to defenses arising after such transfer."

Following the authority of the case cited, we hold that it was error to refuse to charge the law as requested as hereinbefore stated, and to charge the jury as was done by the court, in answer to the question submitted to the court by the jury. The judgment will be reversed and the cause remanded for a new trial, under proper instructions to the jury.

Judgment reversed.

HENDERSON V. CARDWELL.

(9 Baxt. 389.)

Landlord and tenant— emblements.

A tenant under a lease for an indefinite period, but which was terminated September 1, 1873, having sowed a crop of oats in November, 1872, and harvested it in June, 1873, had plowed in the stubble in the latter month, and the crop was growing when he left, in November, 1873. *Held*, that he could not afterward enter and harvest that crop. (See note, p. 96.)

REPLEVIN. The opinion states the case. the plaintiff had judgment below.

W. A. Henderson, for plaintiff.

L. O. Houk and *T. J. Webb*, for defendant.

McFARLAND, J. This was an action of replevin brought by Cardwell to recover a lot of oats. The facts deposed to by the plaintiff, and J. B. Hoxie, witness for the defendant, are that Hoxie, as agent for Dr. Pearne, rented to the plaintiff certain premises near Knoxville, being a house and about twenty acres of land. The plaintiff says he rented "at twelve dollars and a half a month, payable in advance, but by the year, in the month of March, 1872, and remained until the 1st of November, 1873. I expected to keep the place four or five years as Dr. Pearne was absent from the country and I expected to keep it until his return." Hoxie says, "he rented the place to the plaintiff at twelve dollars and fifty cents per month, the renting was not by the year or even for any definite time."

In November, 1872, the plaintiff proves that he sowed on the land a crop of English winter oats and harvested the same in June, 1873, when he plowed in the stubble so as to get another crop, which was the custom, and the crop was growing when he left the place, November 1, 1873. In June after plaintiff left defendant cut and harvested the oats for which the suit is brought.

Hoxie was offered better terms by the defendant, who proposed to take the premises for a longer lease, and this was the reason the plaintiff's tenancy was terminated. The plaintiff gave up the premises without objection and made no mention of the growing oats crop, and none was made by Hoxie to the defendant upon leaving. The question is, do these facts entitle the plaintiff to a recovery?

The argument for the plaintiff is that he was a tenant at will, and his term having been terminated by his landlord, he was entitled to the growing crop as emblements and free egress, etc., to cut and carry the crops away. The general principle is not doubted. See 2 Bl. Com. 126. But if the plaintiff was a tenant from year to year, as his own testimony indicates, he would not be entitled to the emblements after the year which terminated his tenancy. Though, as the judge charged in this case, if the landlord suffered the tenant to hold over after the termination of the first year, the

presumption would be that the tenancy was to continue for another year, and if the landlord terminated the tenancy before the expiration of the second year, the tenant should have to the end of the year to remove his crops, but we think not beyond the end of the year, as is to be implied from the judge's charge. For in a case of tenancy from year to year, where the term depends upon a certainty, if the tenant holds to the end of the year, he cannot have emblements unless specially reserved. Broom's Leg. Max. 396. And so if his term is by the landlord wrongfully terminated before the year, his right to emblements could not extend beyond the year, his right in this respect could not be increased by the termination of his tenancy before the end of the year.

But another question is whether the crop is of that character secured to tenants in such cases.

When the tenancy is of uncertain duration and is terminated by the landlord after the crop is sown but before it is severed from the freehold, the tenant or his representative shall be entitled to one crop of that species only which ordinarily repays the labor by which it is produced within the year within which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. But he is not entitled to all the fruits of his labor as such right might be extended to things of a more permanent nature, such as trees or more crops than one, since the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. Such is the law as stated in Broom's Leg. Max. 236 and 394.

The crop claimed in this case is ordinarily an annual crop, but the plaintiff harvested the first year's product of the sowing, and claims a second year's crop of the same sowing. True he bestowed additional labor to produce this second crop, but as we understand the rule as above stated it goes no further than to give to the tenant the benefit of the law of emblements, so as to secure to him the benefit of the annual crop sown by him before the termination of his term. If this second annual crop of oats had grown without labor by the plaintiff he would not have been entitled to it after the expiration of his term, as he had already harvested the crop sown by him, and the additional labor bestowed upon it does not change the result. The crop claimed matured in 1874 was sown in November, 1872. Plowing in the stubble, we think, is not equivalent to sowing another crop, though it produce the same result. The policy

of the rule is the encouragement of the tenant in the cultivation of the soil and is satisfied by giving him, after the termination of his term, the proceeds of his annual crop sown by him.

Let the judgment be reversed.

Judgment reversed.

NOTE BY THE REPORTER. — In *Reiff v. Reiff*, 64 Penn. St. 184, the question of emblements arose as between tenant for life and remainderman, in respect to grass. The court said: "At the time of her death there was standing uncultivated on the premises a quantity of mixed timothy and clover grass, a quantity of grass, part meadow and part timothy, and a quantity of timothy exclusively. The question was, was this grass emblements, belonging to the tenants of the deceased owner of the life-estate? The vegetable chattels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously but by labor and industry, and thence are called *fructus industriales*. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements; because as it is said the improvement is not distinguishable from what is natural product, although it may be increased by cultivation (1 Williams on Executors, 670, 672)." The court below said: "It may be admitted, that Indian corn, wheat, rye, oats, buckwheat and potatoes, and even hemp, Hungarian grass, flax and millet are included among the emblements that do not pass to the remainderman, but these are all annual products; when cut the root dies."

In *Graves v. Weld*, 5 B. & Ad. 105, a tenant for a term determinable upon a life, sowed the land in spring, first with barley and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it, but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing. Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed; second, even if the tenant was entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had already been taken by him at the time of cutting the barley.

"Crude turpentine which has formed on the body of the tree, and is usually known as 'scrape,' is personal property, and belongs to the person who has lawfully produced it by cultivation. *State v. Moore*, 11 Ired. 70. It is an annual product of labor and industry, and although it adheres to the body of the tree it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales*, for it is not the spontaneous product of the trees, but requires annual labor and cultivation. Upon a similar principle, hops which spring from old roots have long been regarded as emblements. A lessee of turpentine trees, even after the expiration of his lease, has the right of 'entry, egress and regress' to remove the 'away-going crops' which he has produced by his labor, provided he does so within reasonable time." *Lewis v. McNatt*, 65 N. C. 63.

In *Stewart v. Donahy*, 9 Johns. 108, Kerr, C. J., said: "The common law has established a distinction in respect to this very subject of emblements, between the right to emblements and the costs of ploughing and manuring the ground, so that the determination of an estate at will would give to the lessee his emblements, but not any compensation for these improvements. He might be ousted of the possession before the crop was in the ground, and wholly lose the expense of ploughing and manuring the land, though if he was ousted afterward he would be entitled to the emblements. * * * Compensation for preparing the ground for seed is not an indemnity for the loss of the crop, which includes the loss of the seed, the labor of sowing and nursing it, and the hopes, to the laborer and his family, of a fruitful harvest. To the same effect, *Price v. Pickett*, 21 Ala. (N. S.) 741.

See generally, *Reeder v. Sayre*, 70 N. Y. 180; S. C., 36 Am. Rep. 507.

Bachman v. Roller.

BACHMAN V. ROLLER.

(9 Baxt. 408.)

Limitation — statute of — acknowledgment — to stranger.

A promise to a stranger to pay a debt barred by the statute of limitations is only available where it was intended to be communicated to the creditor.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Ingersoll & Robinson, for complainant.

Haynes & Vance, for defendant.

SNEED, J. The action was upon a promissory note, executed 31st of January, 1860, by the defendant to the plaintiff, and due at one day, for \$2,791.73, payable in "par bank notes." Underneath the note was written a memorandum by the holder in these words and without signature: "Samuel Bachman is bound in writing to pay the above in gold and silver. See obligation."

The suit was instituted on the 1st of April, 1872, and two verdicts have been had for the plaintiff. Among the pleas originally filed were those of a tender and the statute of limitations of six years; but the former plea was abandoned and withdrawn, as appears of record and the defense was rested on the statute of limitations, to which the plaintiff had filed the replication of a new promise, which issue was found in favor of the plaintiff, and judgment rendered accordingly.

[Immaterial matters omitted.]

These immaterial matters out of the way, we come to consider the main point of contention in argument here as in the court below; and that is, whether the plaintiff has made good his replication of a new promise by proof of such an acknowledgment of the debt as a subsisting obligation, and such a promise to pay, express or implied, as will obviate the bar of the statute. It is insisted on the part of defendant, that if any such acknowledgment and new promise is established by the proof at all, it is upon the testimony of third persons to whom the same was made, and not to the plaintiff.

* See *Allen v. Collins* (70 Mo. 128), 35 Am. Rep. 416, and note, 417.

iff or his agent. And there is much force and plausibility in the argument of the defendant's counsel, that if the theory of our adjudged cases be true, such an acknowledgment, if it is to operate at all, must have the effect of creating a new contract founded on the old consideration; that such a contract must be a bilateral agreement between the parties themselves, and not between the defendant and a stranger. In accordance with this view the defendant's counsel requested the court to exclude all promises or acknowledgments made by the defendant to any other person than to the plaintiff himself or his attorney. This was refused, and promises and acknowledgments to divers persons other than the plaintiff or his agent were permitted to go to the jury. The effect of all our adjudged cases upon this subject is, that there must be an express promise to pay or an admission of an existing debt, which the debtor is willing to pay. *Hunter v. Starkes*, 8 Humph. 656; *Belot v. Wynne*, 7 Yerg. 534; *Broddie v. Johnson*, 1 Sneed, 464; *Butler v. Winter*, 2 Swan, 91. But we are not aware that the precise question, whether such a promise or acknowledgment to a stranger would answer the requirements of the law, has ever been directly adjudged from this bench. It does appear however that the question was incidentally adjudged in favor of the plaintiff's view in the case of *Thompson v. French*, 10 Yerg. 457, where the testimony of a stranger to the record, having no agency or other privity with the plaintiff, so far as the case discloses, was permitted to testify as to a conversation with the defendant as to a promise and acknowledgment of a subsisting liability, which the court held conclusive of the case. Whether or not the question was presented and contested upon a like agreement, as in this case, we are not advised. It was broadly held in many of the earlier cases on the subject, that such an acknowledgment was good whether made to a third person or to the plaintiff in the action. 5 Harring. 380; 1 Ala. 225; 9 Wend. 897; 16 id. 477; 4 Wooster, 319; 21 Barb. 351; 4 id. 163; 6 id. 585; 4 Pick. 100; 16 Vt. 193; 1 H. & G. 204; 7 Ga. 505; 4 Potter, 225. But many other cases qualify the doctrine so as to make the sufficiency of the promise depend upon the fact whether the intention appears that the declaration to the stranger should be communicated to the creditor. *Wakeman v. Sherman*, 5 Seld. 85; 2 Story Eq., § 1521; *Collett v. Frazier*, 3 Jones' Eq., 89; 26 Ala. 433. In the case of *Collett v. Frazier*, it was held by the Supreme Court of North Carolina that where a

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person on his death-bed said to a bystander that he owed a certain sum, which he named, as a balance for certain slaves which he had bought, and that he wished it paid, it was held a sufficient acknowledgment of the debt to take it out of the statute of limitations. 3 Jones' Eq. 80; 3 Batt. Dig. 420. This is consistent with the more modern rulings on the subject, as it was manifest that the debtor in that case wished and intended the declaration thus made in *extremis* for the benefit of the creditor and to be communicated to him. And it is said in the learned note to the case of *Whitcomb v. Whiting*, 1 Smith's Lead. Cas. 889, that an exhaustive review of all the authorities shows, that most of the cases in which an admission to one man has been held to take the case out of the statute in favor of another, will be found to rest on this ground, or on that of the existence of such a privity between the person to whom the declaration was addressed and the creditor, that what was said to the former might fairly be presumed to have been meant to reach the ears and influence the course of the latter. *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Clark v. Hougham*, 2 B. & G. 149; *Bloodgood v. Bruen*, 4 Seld. 362; *Evans v. Carey*, 29 Ala. 99.

We hold that this latter doctrine is the sounder and safer of the two, upon the principle that the new promise after the remedy is barred creates a new contract; and if it is a new contract, it follows as a logical sequence that it must be made between the parties in interest and not between the defendant debtor and an utter stranger. The charge of the court on this point, and the admission of the testimony referred to, was erroneous.

Let the judgment be reversed and a new trial be awarded.

Judgment accordingly.

 WESTERN UNION TELEGRAPH COMPANY V. STATE.

(9 Bart. 509.)

Taxation — telegraph line.

A telegraph line is taxable as real estate, although it has paid a privilege tax.

THE opinion states the case. The plaintiff had judgment below.

W. S. Munday, for plaintiff in error.

McFARLAND, J. The only question in this case is whether the line of telegraph owned by plaintiff in error is subject to State and county taxes as other property in the county of Sumner. The general question to be decided will be as to whether telegraph lines as property are now subject to taxation under our laws, this particular case being brought, as we understand, to test the question.

By the Constitution of 1870, art. 2, sec. 28, all property, real, personal or mixed, shall be taxed; but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or private corporation purposes, and such as may be held for purely religious, charitable, scientific, literary or educational purposes, also \$1,000 worth of personal property in the hands of each tax-payer, etc. It is ordered, all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State." By the act of March 24, 1875, it is enacted in pursuance of the imperative mandate to the legislature, that all property shall be taxed with the exception laid down in the Constitution specified. By the Constitution and this law all property with the exceptions specified is to be taxed. It is however to be taxed according to its value, that to be ascertained in such manner as the legislature shall direct, so that the taxes shall be equal and uniform throughout the State. The only question then is, does the system under which the value of our property is to be ascertained furnish the means of ascertaining the value of a telegraph line running through a county? if so, then its taxation follows as a matter of course. It is property; it has a local *situs*, which may be readily ascertained so far as the line is concerned, is affixed to the soil, and its cost and value may be readily ascertained, we think, with approximate certainty sufficient for all practical purposes of taxation, absolute certainty in value and equality being a thing probably unattainable by any system.

We treat the telegraph line as partaking of the nature of realty, in analogy to the now settled doctrine that railroads and rolling stock necessary to their use running alone on their tracks are so treated. We are aware that this is not strictly within the definitions of realty as found in the ancient common law, but those definitions were formed in a ruder age than this and must be accommodated to

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the advance of the age by sound analogies as demanded by the exigencies of our diversified development ; with this assumption we look to the act of 1875, March 23, providing for the assessment and collection of revenue, to see if this property may fairly be assessed and its value ascertained for taxation. It is there provided for the election of a tax assessor to assess and list all the real estate in his county. He is, by the second section of the act, to prepare a list of all taxable real estate in each civil district or ward of his county, then select in each district with taxable realty worth less than \$200 by last assessment, two reputable, prudent and discreet freeholders, residents therein, who being sworn impartially to perform their duties, in connection with himself, are to assess and value all such property and prepare a list of the same. Other provisions regulating the details of the proceeding need not be noticed.

We think it clear that all this may be done as to a telegraph line, as well as any other property locally situated in each civil district, including instruments, etc., attached to and making up a part of a complete line of telegraph fitted for use as such. We can see no need for the legislature providing any special or arbitrary mode for ascertaining how such property shall be assessed. Nor would it be proper to affix any arbitrary valuation upon it. Its real value is to be ascertained as other property and is taxed upon the same principle. In fact, to fix any arbitrary mode for assessing or ascertaining the value of property of the kind would not be in accord with the spirit of the Constitution, as probably tending to make an arbitrary results not the real one, that is the true value of the property, which is what was designed by the Constitution. The same principle applies to former modes of assessment before the act of 1875 here referred to, the particular mode of ascertaining the value by a general assessor and freeholders being the only essential difference. We think this the best solution of this question. We cannot assume the legislature have failed to obey the mandate of the Constitution requiring all property to be taxed, if what they have enacted may be made to reach the end designated. We think we have shown that our law may be strictly pursued and this property onerated with its fair share of the burdens of government. We find no exceptions in its favor — none in fact is authorized by the Constitution or by the act of 1875. We do not feel called on to make one in favor of this corporation unless compelled by law so to do. We think no such compulsion exists. This company, as others do, pays a privilege

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tax on privilege of telegraphing, of four mills on every \$100 in gross receipts by the act of 1871. This however cannot affect the liability of the property owned by the company to taxation as property. The privilege is one thing, the property owned by the party having the privilege, another, each of which may be taxed, the one as privilege the other as property, according to its value as provided by the Constitution. We therefore conclude this property is subject to taxation as such. As to the privilege tax we need not examine the liability of the company to its payment, as it is not in question in this case.

Not do we deem it necessary to examine the statute to see if the County judge has pursued precisely the proper mode of assessing this property in this case; we settle the principle and the details can be adjusted by counsel in the judgment.

Affirm the judgment.

Judgment affirmed.

McFARLAND, J., dissented.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

JAMISON V. STATE.

(37 Ark. 445.)

Original law—false pretenses—obtaining satisfaction of debt.

Obtaining satisfaction of one's debt due to another, by false pretenses, no money passing, is not indictable. (*See note, p. 104.*)

CONVICTION of false pretenses. The defendant, owing Thompson, and Thompson being indebted to Mattingley in the same amount and having the money to pay him, the defendant by false pretenses induced Mattingley to satisfy Thompson's claim against the defendant by giving Thompson credit for the amount and taking from the defendant a worthless mortgage to secure it. No money passed.

Ridout, Coblenz and Shepard, for appellant.

C. B. Moore, attorney-general, for State.

HARRISON, J. There was no evidence that the defendant obtained any money from Mattingley. Proof that by the false pretense alleged he procured the satisfaction of his indebtedness to

Thompson by him, though sufficient to sustain an action by Mattingley against him for money lent, was irrelevant to the charge in the indictment. The money must have been actually, and not merely impliedly or constructively obtained, and must have come into the defendant's possession.

Mr. Bishop says: "It is held that if the thing obtained is not money, or other article within the express words of the statute, but merely a credit on account, which may bring money, the substantive offense is not committed." 2 Bishop Crim. Law, § 480.

The second instruction asked by the defendant, and refused by the court, was therefore correct; and the verdict was clearly against the evidence.

[Minor point omitted.]

The judgment is reversed and the cause remanded with instructions to arrest the judgment.

Reversed and remanded.

NOTE BY THE REPORTER. — The same has been held of an indorsement on a promissory note. *State v. Moore*, 15 Iowa, 412. To same effect, *Reg. v. Eagleton*, Dears. 515. In *Commonwealth v. Harkins*, 123 Mass. 79, it was held, that a person, who by false and fraudulent representations obtains the consent of a city to the entry of a judgment in his favor against it in an action then pending, and the payment of a sum of money by the city in satisfaction of that judgment, cannot be convicted of obtaining money by false pretenses. GRAY, C. J., AMES and SOULE, JJ., dissenting. The court, COLT, J., said: "The allegations are, that an agreement that judgment should be rendered was obtained by the pretenses used, and that the money was paid by the city in satisfaction of that judgment. It is not alleged, that after the judgment was rendered, any false pretenses were used to obtain the money due upon it; and even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay. *Commonwealth v. McDuffy*, 126 Mass. 487; *People v. Thomas*, 3 Hill, 169; *Re v. Williams*, 7 C. & P. 354. A judgment rendered by a court of competent jurisdiction is conclusive evidence between the parties to it that the amount of it is justly due to the judgment creditor. Until the judgment obtained by the defendant was reversed, the city was legally bound to pay it, notwithstanding it may have then had knowledge of the original fraud by which it was obtained; and with or without such knowledge it cannot be said that the money paid upon it was in a legal sense obtained by false pretenses, which were used only to procure the consent of the city that the judgment should be rendered.

"The indictment alleges the fact of a judgment in favor of the defendant which, if not conclusive as between the parties to this criminal prosecution, is at all events conclusive between the parties to the transaction. To hold that the statute, which punishes criminally the obtaining of property by false pretenses, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretenses were used to obtain a judgment, as one step toward obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal courts, and subject the judgment creditor to prosecution criminally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property."

SOULE, J., dissenting, among other things, said: "The indictment sets forth that the defendant, with intent to cheat and defraud, made certain false representations and pre-

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tenses, as to matters within his knowledge and relating to existing facts as well as to past transactions, concerning which neither the city of Lynn nor its agent had the means of knowing the truth, and that by means of these representations and pretenses, the city, believing them to be true, was induced to and did part with its money to the defendant. It further sets forth that the defendant received the money by means of the false pretenses, and with intent to cheat and defraud the city of Lynn, and that the several representations and pretenses were not true. It therefore charges an offense. *Commonwealth v. Hooper*, 104 Mass. 549; *Commonwealth v. Parmenter*, 121 id. 354.

"The additional allegations as to the consent to the entry of judgment and the satisfaction of the judgment are merely a narration of the methods by which the parties proceeded in paying and receiving the money, and are wholly unnecessary, but they do not charge another offense, nor make the indictment bad for duplicity. The obtaining of the money by false pretenses is the gist of the offense, not the obtaining of the judgment."

"A judgment is conclusive only between the parties and their privies, and strangers are not bound nor affected by it. To the indictment the Commonwealth is a party, but was a stranger to the action between the city of Lynn and the defendant, in which the judgment was recovered. That judgment is therefore no evidence against the Commonwealth that the defendant was entitled to recover any thing of the city. It has no bearing on the case at bar, except as being a part to the machinery employed in obtaining the money wrongfully. Its existence is no bar to prevent the Commonwealth from showing, in its prosecution of crime, that it and the money were obtained by false pretenses. To hold otherwise would be to provide a shield for the criminal in his own crime. There is nothing in this view of the law which conflicts with the decision in the recent case of *Commonwealth v. McDuffy*, 126 Mass. 467. It was there held, that one who obtains only what is due him by false pretenses commits no punishable offense. It was not held that the Commonwealth was estopped to prove the truth, by a judgment to which it was not a party. The general doctrine, that only parties and privies are concluded by a judgment, is too familiar to require the citation of authorities in its support. An application of it peculiarly pertinent to the case at bar was made in *Duchess of Kingston's case*, 20 Howell's St. Tr. 355."

ST. LOUIS, I. M., AND S. R. R. COMPANY V. CANTRELL.

(37 Ark. 519)

Negligence — contributory — jumping from moving train.

A passenger on a railroad train was aroused at 10 o'clock at night by the conductor, and informed that his station was reached, and told by him and the brakeman to hurry and get off. The train moving very slowly, he stepped off, and as the train had overshot the platform, he fell and was injured. *Held*, that an action therefor was maintainable.*

ACTION for personal injury by negligence. The head note states the facts. The plaintiff had judgment below.

Geo. H. Benton, and *Dodge & Johnson*, for appellant.

W. R. Coody, for appellee.

*See *Com. v. Boston & Maine Railroad* (129 Mass. 500), 37 Am. Rep. 382, and note, 384.

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HARRISON, J. It was clearly the duty of those in charge of the defendant's train, upon its arrival at Knoble, to stop the same opposite the platform, that the plaintiff might get off.

On the other hand, it may, as a general proposition, be said, that it is imprudent, and a want of proper care, to alight from a train while it is in motion ; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. *Crissey v. Passenger Railway Co.*, 75 Penn. St. 83. It would not be so if the train was moving so slowly that no damage could be reasonably apprehended.

But though in fact it may be hazardous, a passenger who does so at the instance or direction of the conductor or other employe in the management of the train, on whose opinion or judgment in the matter he has the right to rely, and where the risk or danger was not apparent, cannot be chargeable with negligence. *Filer v. New York Central R. R. Co.*, 49 N. Y. 47 ; s. c., 10 Am. Rep. 327 ; *Lambeth v. North Car. R. R. Co.*, 66 N. C. 499 ; s. c., 8 Am. Rep. 508 ; Whart. on Neg., § 371.

It would seem that the train, when the plaintiff attempted to jump upon the platform, was moving very slowly, as the conductor testified that after he fell it moved only fifteen or twenty feet before it stopped ; and that the direct or immediate cause of the accident was that it had too far passed the platform, when he leaped from the car, for him to reach it.

There was no evidence that he knew that there was any risk or hazard in the attempt to get off, or of any want of care in him, or of any negligence on his part which contributed to the accident ; but it was proved that he was told by the conductor and brakesman "to hurry and get off, the latter telling him also that they were in a hurry, and that he was urged by their impatience to make the attempt.

We can see no objection to any of the instructions the court gave the jury. Those in relation to the question of negligence are in strict accordance with the views above expressed.

[Other matters omitted.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

HENDY v. DINKERHOFF.

(57 Cal. 2.)

Fixtures — as between lessor of chattels and defaulting purchaser of land.

The plaintiff leased to L. an engine and boiler, with a privilege of purchase. L. affixed them in a permanent manner to land of the defendant in possession of L. under a contract for purchase. The contract provided that if L. failed to perform, all tools and machinery put on the land by him should belong to the defendant. The plaintiff knew that the engine and boiler were to be affixed to the land, but did not know of this agreement respecting fixtures. L. failed to perform. *Held*, that the plaintiff could recover the engine and boiler or their value from defendant.*

ACTION for the possession or value of an engine and boiler. The opinion states the case. The defendant had judgment below.

George G. Blanchard, for appellant.

G. J. Carpenter, for respondent.

Ross, J. This is in an action to recover the possession of a certain steam engine and boiler, or their value. The case comes up on the

* Compare *Morrison v. Berry* (48 Mich. 359), 36 Am. Rep. 446.

judgment roll, and from the findings it appears, that on the 19th of July, 1877, the plaintiff, being the owner, leased the property to one Lampson, for the period of two months from the 1st of August, 1877, the latter to pay for its use \$283.25 on the 1st day of September, and a like sum on the 1st day of October, 1877, with the right on the part of Lampson to purchase the property from the plaintiff for one dollar, in the event he should keep all the covenants of the lease, but "until then, he should have no right, claim, or interest in or to said property, except as lessee, and subject to the conditions of said lease." Among the covenants of the lease, was one to the effect, that in the event the lessee should fail to keep any of them, the plaintiff should thereupon have the right to retake the property. At the time of making the lease, the plaintiff knew that the engine and boiler were to be used by Lampson in working a mine situated about two miles from Diamond Springs, in El Dorado county. Situated upon this mine was a quartz mill, which together with the mine belonged to defendants. Prior to the making of the lease between the plaintiff and Lampson, the latter had entered into an agreement with the defendants, looking to the purchase by him of the mill and mine, by the terms of which agreement Lampson was to take possession of the mill and mine, and was to sink a shaft on the latter, after doing which, and within a given period of time, he had the privilege of buying the mill and mine from defendants at a certain price. The contract also provided, that any and all machinery and tools put upon or used in the mill or mine should, in the event Lampson failed to purchase, become the property of the defendants. In accordance with this agreement, Lampson, in August, 1877, took possession of the mill and mine, and thereafter placed the engine and boiler leased to him by the plaintiff in the mill, and proceeded to work and operate the mill and mine for about ten days, at and after which time he "abandoned and left said mill, mine, and property, and abandoned his contract with defendants, and thereafter made no claim to hold, retain, work, or operate said mill or mine, and abandoned all claim to purchase the same from defendants under said contract." In November, 1877, the defendants took possession of the mill and mine, including the engine and boiler, and have ever since retained possession thereof.

At the time of making the lease, the plaintiff did not know of any agreement between Lampson and the defendants, and the latter never knew, until after their possession in November, 1877, of the

existence of the lease between plaintiff and Lampson. The engine and boiler were attached and affixed to the mill by Lampson, "by means of iron bolts, timbers, and masonry, in such a manner to become permanently affixed to the mill, and could not be removed without destroying the masonry and stone wall, and greatly damaging some of the timbers of the mill," which latter (the mill) was permanently fixed and attached to the mine. After demand made, the defendants refused to deliver plaintiff the engine and boiler; hence the present action to recover them.

It is well settled, as said by the Court of Appeals of New York, in *Tift v. Horton*, 53 N. Y. 380, s. c., 13 Am. Rep. 537, "that chattels may be annexed to the real estate and still retain their character as personal property. See *Voorhees v. McGinnis*, 48 N. Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y. 344), as when the property could not be removed without practically destroying it, or where it, or part of it, is essential to the support of that to which it is attached." *Ford v. Cobb*, 20 N. Y. 344.

In the present case, there can be no doubt, that as between the plaintiff and Lampson, the engine and boiler remained personal property notwithstanding the fact that it was by him attached to the mill; for as said in *Ford v. Cobb*, 20 N. Y. 352: "They were not so absorbed or merged in the realty that their identity as personal chattels was lost; and unless such an effect has been produced there is no reason in law or justice for refusing to give effect to the agreement by which they were to retain their original character." See also *Eaves v. Estes*, 10 Kans. 314; s. c., 15 Am. Rep. 345; *Pierce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 33 id. 66; *Curtis v. Riddle*, 7 Allen, 185.

The question remains, can they be so regarded in the hands of the defendants? How this would be if the latter occupied the position of *bona fide* purchasers, without notice, of the real estate to which the chattels were attached, need not be determined for they are not in that position. They were all the time the owners of the

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property to which the engine and boiler were attached, and as such owners placed Lampson in possession of the mill and mine, with authority to work them, and under an agreement on his part to purchase, and with the stipulation that in the event he failed to do so, "any and all machinery and tools put upon or used in said mill or mine" should become the property of the defendants. Under these circumstances the latter must be held to stand in the shoes of Lampson, and the property in question treated as personalty in their hands as in his. *Smith v. Benson*, 1 Hill, 176; *Tift v. Horton*, 53 N. Y. 377; s. c., 13 Am. Rep. 537; *March v. McKoy*, 56 Cal. 85.

Judgment reversed and cause remanded, with instructions to the court below to enter judgment for the plaintiff on the findings.

Judgment accordingly.

McKINSTRY, J., and MORRISON, C. J., concurred.

GRIDLEY V. DORN.

(57 Cal. 78.)

Wager — on horse race.

A wager on a horse race is void as against morals and public policy.

ACTION to recover a wager. The opinion states the case. The plaintiff had judgment below.

A. J. Gifford and F. C. Lusk, for appellant.

Burt & Hamilton, for respondent.

ROSS, J. This is an action to recover a wager alleged by the plaintiff to have been made and won by him on the result of a horse race. The defendants, who were the stakeholders, interposed a demurrer to the complaint which was overruled by the court; and thereupon they answered denying that the plaintiff won the wager, but averring that the other party thereto did win it, and that as such winner they had paid the stakes to him. After trial, judgment was rendered for the plaintiff.

It is the first case of the kind that has reached this court. *Johnson v. Fall*, 6 Cal. 359, was an action brought to recover a wager made between the defendant and one McNulty, that a railroad then in contemplation between Benicia and Marysville would be completed within two years from the date of the wager; and this court sustained the action, holding that it was sustainable at common law, and since the common law has been adopted as the rule of decision in this State, except where changed by statute, sustainable here. While at common law a wager made in respect to matters not affecting the feelings, interest or character of third persons, or the public peace, or good morals, or public policy, is valid and can be recovered, yet if it does involve a breach of the peace or is calculated to wound the feelings or affect the interests or character of third persons, or is in relation to a matter which is against good morals or sound public policy, it is illegal and void, and no action in affirmance of the contract can be maintained. *Johnston v. Russell*, 37 Cal. 672. The tendency of the courts everywhere is to restrict rather than enlarge the rule, and it has often been regretted by the judges, even in England, that such actions ever should have been maintained in courts of justice.

As observed already at common law, no action in affirmance of a contract of wager made against good morals or sound public policy was maintainable; and such in our opinion was the nature of the wager in this action. Indeed, if the question were a new one in this State, we should be inclined to hold all wagers contrary to good morals and sound public policy, and therefore invalid; for every bet, as said by the Supreme Court of South Carolina in *Rice v. Gist*, 1 Strobh. 84, "tends directly to beget a desire of possessing another's money or property without an equivalent." See also in *Collamer v. Day*, 2 Vt. 146; *Wheeler v. Spencer*, 15 Conn. 30; *Lewis v. Littlefield*, 13 Me. 233; *Edgall v. McLaughlin*, 6 Whart. 176; and *Wilkinson v. Tousley*, 16 Minn. 299; s. c., 10 Am. Rep. 139, where it was held that a wager similar to that here under consideration was illegal and invalid, as against good morals and sound public policy.

In *Johnston v. Russell*, *supra*, it was held, that where an illegal wager is made, the parties to it may, before the wager is decided, recover their stakes from each other or from the stakeholder, if one has been employed; but that after the money has been lost and won and the result generally known, neither party should be heard in a court of justice. To the same effect is *Hill v. Kidd*, 43 Cal. 615.

The impropriety of the courts entertaining such actions as this is well illustrated by the circumstances of the present case; for it appears from the record to have been conceded in the court below that the right of the plaintiff to recover depended upon the question whether the wager made was a "by bet" or a "time bet." To determine this question several witnesses were introduced who gave their opinions in the matter, and we have been cited by counsel to the "Spirit of the Times" and the "Rules of the National Trotting Association," as authorities upon the proposition. These are, we believe, standard authorities in turf matters, but cases which depend upon them for their solution have no place in the courts. If notwithstanding the evil tendency of betting on races, parties will engage in it, they must rely upon the honor and good faith of their adversaries and not look to the courts for relief in the event of its breach.

Judgment and order reversed, and cause remanded to the court below, with directions to dismiss the action.

Judgment and order reversed.

MORRISON, C. J., and MCKINSTY, J., concurred.

PEOPLE V. CARLTON.

(57 Cal. 83.)

Criminal evidence — homicide — res gesta — declarations of deceased.

On a prosecution for manslaughter, the prosecution cannot, as part of their affirmative case, prove declarations of the deceased before the conflict, to the effect that he did not propose to attack the defendant.*

CONVICTION of manslaughter. The opinion states the case.

T. H. Laine, for appellant.

The *Attorney-General*, for respondent.

Ross, J. The defendant was indicted for manslaughter, and was convicted of that crime. Several errors are assigned by him on this appeal, but it will be necessary for us to consider but one.

* See *Cox v. State* (64 Ga. 374), 37 Am. Rep. 76.

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The fact that defendant killed the deceased is not disputed ; but it is claimed on his behalf, that in so doing he acted in self-defense. On the trial it had been shown in proof, that on the morning of the day of the homicide there had appeared in a newspaper, published by the defendant, an article extremely abusive of the deceased, and as tending to show that the deceased was not the aggressor in the affray culminating in his death, the wife of the deceased was permitted to testify, against the objections of defendant, that her husband breakfasted at home on the morning of the day of the homicide, and that the following conversation then and there occurred, to wit : “ Mr. Poole, the gentleman that was boarding there came and told him (deceased) of the article — told him that Mr. Carlton had published an article calling him a horse-thief — and I merely remarked to my husband that it was nothing ; it was about the horse that was sold a while ago — for him to publish the right statement — for him to take no notice of Mr. Carlton’s remarks. He said, no ; I will give him a chance to prove it in the courts. He went and spoke to Mr. Poole, and after breakfast started out. I said to my husband, I would not have any thing to do with it. He said, no ; I want to give Mr. Carlton a chance to prove it ; and after he started out of the door — he had his pistol in one pocket — he said, I have a good mind to leave this in the house ; but I said, I don’t want to stay in the house with a loaded pistol, and he put it in his pocket, and came back and got his hat and cigars, and went out.” The questions by which this testimony was elicited were objected to by the defendant, on the ground that it was immaterial, irrelevant, and inadmissible under the issues. The objections were overruled, and an exception taken.

It is claimed, on the part of the people, that the declarations testified to by the witness constituted a part of the *res gestæ*, and were therefore admissible. *People v. Arnold*, 15 Cal. 476, is relied upon in support of the position. In that case, it was held, that where a rencounter occurs between two persons, one of whom is killed, and the circumstances are equivocal as to which one of the two commenced the affray, the fact that one of the parties had previously procured a weapon for the purpose of using it against the other, although the fact is not communicated to the latter, is a circumstance tending to show that the purpose was fulfilled ; and that the declaration made by the party procuring the weapon as to what

he meant to do with it was a part of the *res gestæ*, and illustrative of the transaction; that is to say, illustrative of the act of procuring the pistol. "It shows, in other words," said the court, "the purpose for which the weapon was procured"; and being a part of that transaction, it was, with the act it tended to illustrate, admissible for the purpose of showing, as far as might be, who was in fact the first assailant.

But in the Arnold case, if it had been proven that the deceased had in fact borrowed the pistol, his hostile declarations would not have been admissible as a part of the *res gestæ*; for there would have been no act shown with which it was connected, calling for or admitting of explanation. 1 Whart. Ev., § 266; *People v. Carkhuff*, 24 Cal. 640; *Commonwealth v. Harwood*, 4 Gray, 41. Nevertheless, the threat would have been admissible as an independent circumstance, to be considered by the jury in connection with the other facts and circumstances of the case, in determining the question which of the parties did in fact commence the affray. The same doctrine in respect to threats not communicated is adopted in *People v. Scoggins*, 37 Cal. 676 and in *People v. Alivire*, 55 id. 263.

Where such threats are introduced on the part of the defendant, the prosecution is of course entitled to rebut the evidence of them; but it does not follow that it can, in the first instance, introduce declarations of the deceased, to the effect that he did not intend to assault the defendant, or otherwise commit a breach of the peace. 1 Greenl. Ev., § 156; *People v. Carkhuff*, *supra*.

In the case before us, the declarations of the deceased were to the effect that he intended to give the defendant an opportunity to prove his charges in court. The testimony of the witness admitted in evidence consisted not only of these declarations of the deceased, but of declarations of Poole and the witness as well. This testimony was not a part of the *res gestæ*, and was not admissible under the authorities to which reference has been made, nor upon any theory or principle of the law with which we are acquainted. From it injury might readily have resulted to the defendant, for it might have been and probably was argued therefrom that deceased intended to resort to the courts rather than to force for redress, and therefore did not commence the rencounter in which he lost his life.

Judgment and order reversed, and cause remanded for a new trial.

Judgment reversed and cause remanded.

MCKINSTRY and THORNTON, JJ., concurred.

Leck v. Anderson.

LECK v. ANDERSON.

(57 Cal. 251.)

Constitutional law — seizure and destruction of property illegally used.

A statute providing for the forfeiture and seizure and destruction or sale, by peace officers, without judicial hearing and judgment, of implements used in illegal fishing, is unconstitutional.*

ACTION to recover personal property. The opinion states the case. The plaintiff had judgment below.

E. F. Preston and *O. R. Coghlan*, for appellant.

King & Rodgers, for respondent.

McKEE, J. This was an action of claim and delivery for one net, three boats, and fishing tackle alleged to have been taken and wrongfully detained from the plaintiff.

It appears that the property belonged to the plaintiff, who had rented it to certain Chinese fishermen, for the purpose of fishing in the tide-waters of the State. In December, 1878, these men, who had possession of the property, were catching fish in what is known as Montezuma Cut-off slough, within the jurisdiction of Solano county, by casting and extending their nets more than one-third the way across the slough. That contrivance for catching fish was prohibited by section 636, chapter I, title VX, of the Penal Code, which declared that "every person who shall cast, extend, or set any seine or net of any kind, for the catching of fish in any river, stream, or slough of this State, which shall extend more than one-third across the width of said river, stream, or slough, at the time and place of such fishing, is guilty of a misdemeanor," punishable by fine or imprisonment, or both. Further, it declared that "all nets, seines, fishing tackle, boats, or other implements used in catching or taking fish in violation of the provisions of this chapter shall be forfeited, and may be seized by the peace officer of the county, or his assistant, and may be by him destroyed, or sold at public auction upon notice posted in the county for five days."

* See *Varden v. Mount* (78 Ky. 86), 39 Am. Rep. 208; *Lowry v. Rainwater* (70 Mo. 152), 35 Am. Rep. 420.

At the time of the fishing, the defendant was an acting constable of Suisun township. In that capacity, he arrested the men for a violation of the law, and seized their nets, boats, and fishing tackle. The seizure was followed by the prosecution of the offenders, and they were severally convicted and sentenced to pay a fine. No fault is found with the proceedings against them personally. But no proceedings of any kind were taken against the property which had been seized.

The court below found, as a fact, that the plaintiff knew nothing of the unlawful use of his property by those to whom he had hired it, and did not "connive at or encourage" such use; and it would seem to be harsh justice, to say the least, to deprive him of his property for no guilty act of his own. It may be conceded, that the innocence of the plaintiff would not exempt his property from the punishment of a statute, the provisions of which it had been used to violate, if the statute itself had provided for enforcing the punishment by some judicial proceedings against it. Under such circumstances, property used to commit the aggression might be treated as an offender — as the guilty instrument or thing to which the forfeiture denounced by the statute attached — without reference to the character or conduct of the owner. But the statute under consideration contained no provisions whatever for determining whether the property was liable to condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their possession. It merely authorized a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms, and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county for five days.

Such an enactment cannot be harmonized with those constitutional guaranties which are supposed to secure every one within the State in his rights of liberty and property. "No man," says Mr. Cooley in his work on Constitutional Limitations, "can by his misconduct forfeit his property unless steps are taken to have the forfeiture declared in due judicial proceedings. Forfeitures of rights or property cannot be adjudged by legislative act; and confiscations without a judicial hearing and judgment after due notice would be void as not due process of law."

The cases of the *United States v. Brig Malek*, 2 How. 210 and *Henderson's Distilled Spirits*, 14 Wall. 414, cited in argument by

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counsel for defendant, arose out of judicial proceedings *in rem*, to subject property to condemnation for an alleged violation of the criminal or revenue laws of the United States, and they are authority for the principle that forfeitures are not adjudgeable by legislative act except it may be for a violation of the revenue laws; "except," says the Supreme Court of Michigan, "in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal where he may contest the claim set up against him and be allowed to meet it on the law and facts. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question, and all judicial proceedings are required by the Constitution to be exercised by courts of justice. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination." The law of the land in judicial proceedings requires a hearing before condemnation, and judgment before dispossession.

It follows that so much of the statute under consideration as authorized defendant to arbitrarily seize and destroy or sell the property of the plaintiff for alleged forfeiture, without judicial proceedings for its condemnation, or monition or notice, actual or constructive to its owner of the charges for which the forfeiture was claimed, and of the time and place for determining them, was unconstitutional and void, and afforded no protection to the defendant for the detention of the property in question.

Judgment affirmed.

MCKINSTY and ROSS, JJ., concurred.

Robinson v. Black Diamond Coal Company.

ROBINSON V. BLACK DIAMOND COAL COMPANY.

(57 Cal. 412.)

Water and water-course — fouling stream — injury to land.

In working a coal mine the defendant caused the *debris* to be deposited in a natural stream of water, and the same in the rainy season was carried and left on the plaintiff's land by the natural flow of the stream. *Held*, that the defendant was liable for the injury.*

ACTION for injury to land. The opinion states the case. The plaintiff had judgment below.

W. H. L. Barnes, for appellant.

Miller & Jones, for respondent.

SHARPSTEIN, J. It appears by the evidence introduced on the trial of this case that the plaintiff was, at the time of the commencement of this action, and for a long time before had been, the owner of a tract of land on the margin of the San Joaquin river, and that the defendant had been for several years prior to the commencement of this action mining for coal about three miles distant from, and at an elevation of 700 or 800 feet above the plaintiff's land. That Quercus creek runs from the mine in a deep gulch or ravine until it reaches the low land; and that the water of said creek, during rainy seasons, is discharged upon and spreads over a considerable area of the plaintiff's land.

The evidence introduced by the plaintiff tended to prove that the defendant deposited in said creek, at and near its mine, coal screenings, ashes and other substances, which during the rainy seasons were carried and distributed by the water in said creek upon the land of the plaintiff, and that the value of said land was thereby greatly depreciated.

If the plaintiff was entitled to recover upon this evidence, the judgment of the court below cannot be reversed on the ground of insufficiency of the evidence to justify it, although the defendant introduced contradictory evidence. It is however claimed on behalf of the appellant, that the plaintiff was not entitled to recover

* To same effect, *Penn. Coal Co. v. Sanderson* (94 Penn. St. 302), 39 Am. Rep. 735; so as to sawdust, *Canfield v. Andrew*, 54 Vt. 1. See *Woodyear v. Schaefer*, post.

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upon that evidence, which it is said only shows that the water charged with refuse matter descended upon the plaintiff's land in its natural course, and in obedience to the law of gravitation. If the evidence introduced by the plaintiff did not tend to prove any thing beyond that, it failed to establish the defendant's liability for any damage which the plaintiff may have sustained by reason of the overflow of his land. But the plaintiff's evidence, as we view it, tends to prove another and very material fact, viz.: that said refuse matter was the product of the defendant's mining operations, and was deposited in said creek through agencies controlled by the defendant. And that although it was not responsible for the inundation of the plaintiff's land by the water of said creek, it was responsible for the deposit of the deleterious substances with which said water was charged through its agency upon said land. This does not in any manner involve the question of the defendant's right to mine or prosecute any other legitimate business upon its premises. It would not be claimed that the defendant could convey and deposit refuse matter from its mine upon the plaintiff's land by means of carts or cars without incurring liability for any damages which the plaintiff might suffer by reason thereof. And we know of no principle upon which it could be held that a person may escape liability by doing that indirectly which would render him liable if done directly.

Upon the question of damages the evidence was conflicting; and as the estimate of the court did not exceed that of some of the witnesses, the finding upon that point cannot be disturbed by this court.

There were some exceptions taken during the trial to the rulings of the court which are not discussed in appellant's brief.

We are unable to discover any error in the rulings excepted to, and think that the judgment and order appealed from should be affirmed.

Judgment and order affirmed.

MORRISON, C. J., MYRICK and THORNTON, JJ., concurred.

PACIFIC BANK V. ROBINSON.

(57 Cal. 530.)

Patent — liability of right in, to execution.

The right of an inventor in his patent may be reached and sold upon proceedings supplementary to execution. (*See note, p. 123.*)

THE opinion states the case.

Wheaton & Scrivner, for appellant.

Winans, Belknap & Godoy, for respondent.

McKEE, J. Appeal from an order made after judgment, upon proceedings supplementary to execution, requiring the defendants to transfer and assign, by a proper instrument in writing, as required by the laws of the United States, all their right, title, and interest in a patent-right for broom-sockets, which they hold under United States letters-patent dated October 27, 1874, to a receiver appointed to sell the same, and apply the proceeds in satisfaction of a judgment which the plaintiff had recovered against the defendant in July, 1879.

It is objected that the order is erroneous, because United States letters-patent, issued to inventors and discoverers under the patent laws of the United States, are not the subject of levy and sale, and cannot be applied to the satisfaction of a judgment.

By the law of this State all goods, chattels, money, and other property, both real and personal, or any interest therein of the judgment debtor, are liable to execution. § 688, Code Civ. Proc. And if there be property which cannot be reached by execution, and which the judgment debtor refuses to apply to the satisfaction of the judgment, he may be compelled, upon examination, in proceedings supplementary to execution, to deliver it in satisfaction of the judgment (§§ 714-721, Code Civ. Proc.), *i. e.*, to a receiver appointed to dispose of it in aid of the execution. § 564, Code Civ. Proc. The principle as well as the policy of the law is therefore to subject every species of property of a judgment debtor to the payment of his debts. No species of property would seem to be exempt, except such as is especially exempted by law, and any

property not directly liable to execution may be reached for the satisfaction of the judgments. This was effected, under the old system of practice, by a proceeding in equity, known as the creditor's bill. After a judgment creditor had exhausted his remedy at law, by the issuance of a *fiari facias*, which was returned *nulla bona*, he had the right to invoke the jurisdiction of a court of equity to aid him, upon the principle of compelling a discovery of assets, tangible or intangible, and applying them to satisfying his execution. *Brinkerhoff v. Brown*, 4 Johns. Ch. 671 ; *McDermutt v. Strong*, id. 687 ; *Hadden v. Spader*, 20 Johns. 554.

Proceedings under sections 714 to 721 and section 574 of the Code of Civil Procedure were intended as a substitute for the creditor's bill as formerly used in chancery. *Adams v. Hackett*, 7 Cal. 201 ; *Lynch v. Johnson*, 48 N. Y. 33. So that any property which was reachable by a creditor's bill may now be reached by the process of proceedings supplementary to execution.

As we have said, any tangible property is the subject of seizure and sale on execution. But a patent right is not tangible property. It is an incorporeal thing, subsisting in grant from the government of the United States, yet it is subjected to some of the legal incidents of ownership of tangible property, such as succession and transfer ; but as a creation of legislation, it is transferable only according to the provisions of the statute which created it, and the only question is, has a court of equity power to compel its assignment and sale for the benefit of judgment creditors ?

In 1852, Mr. Justice NELSON, in *Stephens v. Cady*, 14 How. 528, held that a copyright to print and publish maps of the State of New Hampshire could be reached by a creditor's bill, and applied to the payment of debts of the owner of the copyright, under a decree compelling a transfer in conformity with the provisions of the act of Congress. That however was mere *obiter*, because the decision of the question was not necessarily involved in the case. And afterward, in 1854, in the case of *Stephens v. Gladding*, which was a branch of the case of *Stephens v. Cady*, Mr. Justice CURTIS declined to pass upon the question, because neither the copyright nor any interest in it had been attempted to be sold.

But in 1875, the Supreme Court of New York, in the case of *Barnes v. Morgan*, 3 Hun, 703, took up the *dictum* of Mr. Justice NELSON, in *Stephens v. Cady*, and approved of it as a sustainable legal proposition. An order had been made at Special Term direct-

ing the defendant in the case to deliver to a receiver appointed under supplementary proceedings certain patents and models appertaining thereto. From the order defendant appealed to the Supreme Court. Assignability of the patents by the voluntary act of the owner, under the act of Congress which created them, was conceded. And according to the authority of *Hesse v. Stevenson*, 3 B. & P. 577; *Nias v. Adamson*, 3 B. & Ald. 225, and *Coles v. Barrow*, 4 Taunt. 754, it had been established that patent rights of a bankrupt pass by act and operation of law to his assignees in bankruptcy, for the benefit of creditors. In *Hesse v. Stevenson*, Lord ALVANLEY, in delivering the opinion of the court, used this language: "It is said that although by the assignment every right and interest, and every right of action as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignees, yet that the fruits of a man's own invention do not pass. It is true that the schemes which a man may have in his own head before he obtain his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignees require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry." Patent rights being therefore assignable by the voluntary act of the owner, and by act and operation of law, it followed that a court of equity could compel the defendant to assign them to a receiver, to be sold and applied to the satisfaction of judgments against him, and the Supreme Court affirmed the order of the Special Term. "If," said the court, "the use of a monopoly which such a grant confers is not sufficiently productive in the hands of the inventor to pay his debts, the privilege bestowed, being a right of property, as declared by Chief Justice TANEY, should be transferred to the person designated by law, and sold for the benefit of the creditor. It would be marvelous, if not unjust perpetuation of the ideal, if an inventor having obtained a patent, thus divulging his secret, and at the same time acquiring a property in it for practicable purposes, should be permitted to hold it unused against his creditors, until either by compromise or the lapse of time, his obligations should be discharged; and this too although

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it might be one which by assignment, or upon manufacture of the thing invented, would readily yield enough to pay all existing liabilities."

The case of *Campbell v. James*, 17 Blatchf. 43, in the United States Circuit Court of New York, to which we were referred in the argument, is not at all in conflict with the authority of *Barnes v. Morgan*. That case arose out of a bill of equity, in which the defendant was chargeable with the infringement of a patent claimed to be owned by the plaintiff as assignee; and the principal questions involved in the case were, the validity of the assignment alleged to have been made by the owner, and the right of the plaintiff under it to recover as well for the infringement before the assignment to him as for that after. There is nothing in the case which involves the power of a State court in equity to compel the assignment of a patent according to the act of Congress, for the benefit of judgment creditors of the owner. Of course the United States courts have jurisdiction of any questions which arise as to the title itself; but as the thing itself is not exempted from seizure and sale by the laws of the State, we think upon principle and authority that the order of the court below was correct.

Order affirmed.

MCKINSTRY and ROSS, JJ., concurred.

NOTE BY THE REPORTER. — The same doctrine was held by the Supreme Court of the United States, March 6, 1883, in *Ager v. Murray*. GRAY, J., said: A patent right may be subjected by bill in equity to the payment of the judgment debt of the patentee.

"A patent or a copyright, which vests the sole and exclusive right of making, using and vending the invention, or of publishing and selling the book, in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property, capable of being assigned by him at his pleasure, although his assignment, unless recorded in the proper office, is void against the subsequent purchasers or mortgagees for a valuable consideration without notice. Rev. Stat., §§ 4884, 4896, 4962, 4955. And the provisions of the patent and copyright acts, securing a sole and exclusive right to the patentee, do not exonerate the right and property thereby acquired by him, of which he receives the profits, and has the absolute title and power of disposal, from liability to be subjected by suitable judicial proceedings to the payment of his debts.

"In England it has long been held that a patent-right would pass by an assignment in bankruptcy, even without express words to that effect in the bankrupt act. *Hess v. Stevenson*, 3 Bos. & Pul 556; 8 C. C., Davies Pat. Cas. 268; *Longman v. Tripp*, 2 New Rep. 67; *Blaxam v. Elsee*, 1 C. & P. 556; 8 C. C., Ry. & M. 187; 6 B. & C. 169; 9 D. & R. 215; *Mawman v. Tegg*, 2 Russ. 335; *Edelsten v. Vick*, 11 Hare, 78; *Hudson v. Osborne*, 39 L. J. (N. S.) Ch. 79. In *Hess v. Stevenson*, Mr. Justice CHAMBERLAIN, in the course of the argument, said: 'The right to the patent is made assignable; why then may it not be assigned under a commission of bankruptcy?' 3 Bos. & Pul. 571. And Lord ALVANLEY, delivering the unanimous judgment of the court, after observing that it was contended 'that the nature of the property in this patent was such that it did not pass under the assignment,' and 'that although by the assignment every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the

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assignee, yet that the fruits of a man's own invention do not pass,' said: 'It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignee require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry.' 3 Bos. & Pul. 577, 578. The recent bankrupt act of the United States, in defining what property should vest in the assignee in bankruptcy, expressly enumerated 'all rights in equity, choses in action, patent-rights and copyrights,' and requires the assignee to sell all the property of the bankrupt for the benefit of his creditors. Rev. Stat., §§ 5046, 5062-5064. The only difference is, that in England all such rights pass that become vested in the bankrupt before he obtains a certificate of discharge, whereas here only those rights pass which belong to him at the time of the assignment.

"It has been said by an English text-writer that 'a patent-right may be seized and sold in execution by the sheriff under a *scire facias*, being in the nature of a personal chattel.' Webster on Patents, 23. We are not aware of any instance in which such a course has been judicially approved. But it is within the general jurisdiction of a Court of Chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor, which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment-debtor has the entire beneficial interest, of shares in a corporation, or of choses in action. *M'Dermutt v. Strong*, 4 Johns. Ch. 687; *Spader v. Davis*, 5 Id. 280, and 20 Johns. 554; *Edmeston v. Lyde*, 1 Paige, 687; *Wiggin v. Heywood*, 118 Mass. 514; *Sparhawk v. Cloon*, 125 Id. 263; *Daniels v. Eldredge*, Id. 366; *Drake v. Rice*, 130 Id. 410.

"In *Stephens v. Cady*, 14 How. 523, and again in *Stevens v. Gladding*, 17 Id. 447, the point decided was, that by a sale of the copperplate engraving of a map on execution from a State court against the owner of the copyright, the purchaser acquired no right to strike off and sell copies of the map.

"Mr. Justice NELSON, in delivering judgment in *Stephens v. Cady*, said: 'The copperplate engraving, like any other tangible personal property, is the subject of seizure and sale on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process — certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of creditors.' He then cited the cases in Johnson's and Paige's Reports, above referred to, and added: 'But in case of such remedy, we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copyright act, in order to vest him with a complete title to the property.' 14 How. 531.

"In *Stephens v. Gladding*, Mr. Justice CURTIS said: 'There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How. 531, it may be added, that these incorporeal rights do not exist in any particular State or district; they are co-extensive with the United States. There is nothing in any act of Congress, of in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts. That an execution out of the Court of Common Pleas for the county of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That by the levy of such an execution the entire right could be divided and so much of it as might be exercised within the county of Bristol sold, would be a position subject to much difficulty. These are important questions, on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it, was at-

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tempted to be sold.' 17 How. 451. The difficulties of which the learned justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property, or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are *in personam*, and may be enforced in all cases where the person is within its jurisdiction. *Masse v. Watts*, 6 Cranch, 148. And the terms in which he refers to the statement of Mr. Justice NELSON show that there was no intention to criticise or qualify that statement.

"There are indeed decisions in the Circuit Courts that an assignee in insolvency, or a receiver of all the property of a debtor, appointed under the laws of a State, does not, by virtue of the general assignment or appointment merely, without any conveyance made by the debtor or specifically ordered by the court, acquire a title in patent-rights. *Ashcroft v. Walworth*, 1 Holmes C. C. 152; *Gordon v. Anthony*, 16 Blatch. C. C. 234. But in *Ashcroft v. Walworth*, Judge SHEPLEY clearly intimated that the courts of the State might have compelled the debtor to execute such a conveyance. And the highest courts of New York and California have affirmed the power, upon a creditor's bill, to order the assignment and sale of a patent-right for the payment of the patentee's judgment debts. *Gillette v. Bate*, 86 N. Y. 87; *Pacific Bank v. Robinson*, 57 Cal. 520.

"In *Carver v. Peck*, 131 Mass. 291, the court reserved the expression of any opinion upon that question, because unnecessary to the decision. And the assumption in *Cooper v. Gunn*, 4 B. Monr. 594, that an author could not be deprived, against his will, and in favor of any of his creditors, of any of the rights secured to him by the copyright acts, was merely *obiter dictum* unsupported by reasoning or authority."

In *Gillette v. Bate*, *supra*, the court said: "It is conceded that the right acquired by a patentee on the issue of a valid patent is property which is subject to the claims of creditors, and may be reached by creditor's bill and applied to the payment of the debts of the patentee. This doctrine was expressly asserted by NELSON, J., in *Stephens v. Cady*, 14 How. 524, and has been recently adjudicated by the Supreme Court of California, in *Pacific Bank v. Robinson*, 57 Cal. 520, and we entertain no doubt of its correctness. *McDermott v. Strong*, 4 Johns. Ch. 689; *Spader v. Davis*, 5 Id. 280; s. c., 20 Johns. 554. And the court held, in addition, that the debtor might not set up that the patent was void for want of utility or novelty, and therefore not property.

MATTER OF MAGUIRE.

(57 Cal. 604.)

Constitutional law — employment of women in dance-houses.

The Constitution provides that no persons shall be disqualified by sex from pursuing any lawful vocation. An ordinance enacted that no person having charge or control of any place where malt, vinous or spirituous liquors are sold, should permit any female to be there between 6 P. M. and 6 A. M.; with an exception as to wives and daughters attending at hotels, restaurants or grocery stores of their husbands and fathers; and excepting public gardens, and balls not held in drinking saloons or bar rooms. *Held*, unconstitutional.

HABEAS CORPUS. The opinion states the case.

M. S. Horan, for petitioner.

W. C. Graves, for respondent.

THORNTON, J. Mary Maguire petitions for a discharge from custody upon a warrant upon which she was arrested on a charge of having violated the following ordinance passed by the board of supervisors of the city and county of San Francisco, and approved by the mayor in July, 1880:

"Section 32. Every person who causes, procures, or employs any female to wait or in any manner attend on any person in any dance-cellar, bar-room, or in any place where malt, vinous, or spirituous liquors are used or sold, and every female who in such place shall wait or attend on any person, is guilty of a misdemeanor.

"No person owning or having charge or control of any drinking cellar, drinking saloon, or drinking place, or any place where malt, vinous, or spirituous liquors are sold and used, shall suffer or permit any female to be or remain in such drinking cellar, saloon, or drinking place between the hours of six o'clock P. M. and six o'clock A. M. No female shall be or remain in such drinking cellar, saloon, or place between such hours; provided that this section shall not be construed so as to apply to hotels or restaurants or grocery stores, where the wife or daughter of the proprietor may happen to be in attendance; or public gardens, or to balls that are not given or held in drinking saloons or bar rooms; provided further, that if the ball is given for the purpose of evading the provisions of this order, then this order shall be applicable."

The particular offense with which the petitioner is charged is that of waiting on persons in a bar-room where liquors were sold. The offense is against the provisions of the first paragraph in the ordinance as given above, and what is said herein relates to that portion of the ordinance only.

The discharge of the petitioner is claimed on the ground that the ordinance above mentioned is void, as being in conflict with section 18, article XX, of the Constitution of this State, which is in these words:

"No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

It is not asserted or claimed that the business in which she is en-

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gaged is not a lawful one, except for the ordinance in question and the provisions of section 306 of the Penal Code.

Is the ordinance in question in conflict with the above-quoted section of the Constitution?

It becomes then necessary to inquire in what sense the word "disqualified" is used in this section. It is presumed to be used in its natural and ordinary sense, unless there is something in the instrument which shows the contrary. *Weill v. Kenfield*, 54 Cal. 113. The rule on this subject is thus stated by MARSHALL, C. J., in *Gibbons v. Ogden*, 4 Wheat. 188. The framers of the Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have said." Cooley's Const. Lim. 72.

We find nothing in the Constitution which shows that the word is used in the section above considered in any other than its natural and ordinary sense. What then is its ordinary and popular sense? Webster defines the verb disqualify, of which disqualified is the past participle, as follows: "1. To deprive of the qualities or properties necessary for any purpose; to render unfit; to incapacitate; usually with for." "2. To deprive of a legal capacity, power, or right; to disable, as a conviction of perjury disqualifies a man to be a witness." (See same word in Worcester's dictionary.) In our opinion the natural and ordinary sense of disqualify is to incapacitate, to disable, to divest or deprive of qualifications; and that it was used in this sense in the section under examination.

The language of the ordinance is plain, and its meaning unmistakable. It leaves nothing for construction. The words employed in this ordinance incapacitate a woman from following the business for which the petitioner was fined, and disable her from doing so. This being so, she is disqualified by the ordinance under consideration from pursuing a business lawful for men. We are compelled to adopt this, or admit that while the legislature cannot disqualify a person on account of sex from following a lawful business by direct enactment, it may by indirection accomplish the same end by forbidding, under penalty, the prosecution of such business. Such legislation as that just above indicated could only be considered an evasion of the constitutional provision. Such an enactment would be as much a violation of the paramount law as one disqualifying by express words. A woman offending would be liable to the penalty for every day she was so employed. This would usually be consid-

ered as disabling, as imposing a disqualification, and therefore as disqualifying.

But it is further contended that the inhibition or disqualification is not on account of sex, but on account of its immorality; that such employment of a woman is of a vicious tendency, and hurtful to sound public morality, and that this only is the object and design of the ordinance. It is not contended that such business is *malum in se*, but of a hurtful immoral tendency. It may be admitted that such is its object and design, but this object is aimed to be accomplished by an ordinance which precludes a woman from a lawful business. It is said that the presence of a woman in such places has this tendency. If men only congregate, this tendency does not exist in so hurtful a degree; at any rate, it has not been regarded so hurtful, and has not fallen as yet under the legislative ban. So that it comes at last to this, that the preclusion and disqualification is on account of sex. As we have in effect said above, the attempt is thus made to do that by indirection which cannot be done directly. The organic law of the land annuls all such enactments. *Cummings v. Missouri*, 4 Wall. 277; *People v. Albertson*, 55 N. Y. 50; *Taylor v. Commissioners of Ross County*, 23 Ohio St. 22.

It is said that this is nothing more than the exercise of the police power which is vested in the city and county by section 11 of article XI of the Constitution. But is this provision in relation to the police power in the Constitution beyond the restriction of the section we have been examining?

To arrive at the meaning of the Constitution, as of any other writing the whole of it must be examined. If there is an apparent conflict, it is the duty of courts to harmonize them, if it can be reasonably done, so as to give effect to every portion of the instrument. It is not to be supposed that an instrument of this character, every section of which was fully considered, has been framed with contradictory provisions. What was provided in one section may be restrained by the provisions of another.

The section 18 of article XX imposes a restraint on every law-making power in the State, whether an act of the legislature, or an ordinance or by-law of a municipal corporation. It is a positive declaration, made by the sovereign authority, that whatever may be done under the legislative power, in any and every shape or form, shall never, by direct or indirect action, incapacitate any person on ac-

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count of sex from entering upon or pursuing any lawful business, vocation, or profession. This power to make police regulations is as much restrained by the section just referred to as is the legislative power vested in the senate and assembly. Both grants of power are alike made by the Constitution, and both are alike restricted by this section of article XX.

It may be further said of it that it is prohibitory in its character, and needs no legislation to make it active in its effect. It is self-executing, and struck with nullity all acts in existence inconsistent with it as soon as the Constitution went into operation, and all since passed. *McDonald v. Patterson*, 54 Cal. 245.

We have carefully weighed the arguments addressed to us on the point of immorality. But we must presume that all these considerations were discussed and weighed by the convention which framed the Constitution, and the people who adopted it; that they fully considered on the one hand the benefits which would spring from the adoption of a policy like that established by the section, and the bane on the other; and that on a just and fair balancing of the resulting good and evil, they determined to have the section as it is, as fixing and carrying out a policy, in their judgment, the best under the circumstances. As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession permitted by law to be entered on and pursued by those sometimes designated as the stronger sex. To adopt the conclusion to which the reasoning of the counsel for the people would lead us would be, in our judgment, to insert an exception to the general rule prescribed by this section. But there are no exceptions in the section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself, declaring the rule as above stated. The policy of the ordinance is inconsistent with the policy intended and fixed by the Constitution. They cannot both stand.

The Constitution furnishes a rule for its own construction. That
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rule is that its provisions are "mandatory and prohibitory, unless by expressed words they are declared to be otherwise." Art. 1, § 22. We find no such express words in the Constitution. This rule is an admonition placed in this the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant; in brief, "we mean what we say." Such is the declaration and command of the highest sovereignty among us, the people of this State, in regard to the subject under consideration.

We will add here that the law-making power of the State is ample to make laws affecting both sexes alike, and not inhibited by the Constitution which will accomplish the object so much desired — to prevent practices hurtful to public morality. The Constitution was not framed with a disregard of the important considerations urged upon us in this regard. It merely directs that a law which is framed to accomplish this object by affecting or operating upon lawful callings, shall affect both sexes alike. We are not at liberty to say that such important matters were overlooked in framing our organic law.

The ordinance and law both being unconstitutional, there is no offense, and there can be no valid conviction and sentence; hence no jurisdiction for any purpose. *Ex parte Kearney*, opinion filed May 27, 1880; *Ex parte Siebold*, 100 U. S. 375-377, opinion of the court by BRADLEY, J.; *Ex parte Clarke*, id. 402, 405-407, dissenting opinion in case, and in *Ex parte Siebold*, per FIELD, J.; *In re Wong Yung Quy*, 6 Saw. 237; *In re Parrott*, id. 349.

From the foregoing, it follows that the section of the Penal Code above referred to, and the ordinance, are both alike in conflict with and inconsistent with the Constitution, and therefore void. They ceased when the Constitution went into effect (art. XXII, § 1), if passed before it; the same is true, of course, if enacted since.

The petitioner is entitled to her discharge, and it is so ordered.

So ordered.

SHARPSTEIN and MCKEE, JJ., concurred.

MCKINSTY, J., concurring. I concur in the judgment. I am not prepared to say however that the supervisors cannot, by proper legislation, prevent females from pursuing avocations, which although permissible to men, involve a propinquity of the sexes under such circumstances as may lead directly to immoral results, or to the desecration of the prudent reserve between members of

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the opposite sexes, which it is the province of wise legislation to encourage. It has always been understood that the prevention of such results was a proper exercise of the police power of the State. By such legislation the woman (or the man, as the case may be) is not prohibited from pursuing any lawful business, vocation, or profession "on account of her sex;" she is prohibited because of the immorality or indecency connected with the business. For example: There might be very good reason why women (and not men) should be employed as attendants at a bathing establishment to which their own sex alone have admission; but if a law should be enacted prohibiting the employment of females as attendants at public baths — frequented by men only — would it be adjudged that the law was unconstitutional because persons would thereby be prohibited from pursuing a vocation "on account of sex"? The Constitution provides that no person shall be prohibited from pursuing any lawful business merely because of his or her sex, but it does not prohibit the legislature from declaring certain conduct unlawful, even though it may constitute a "business." The Constitution does not, in my view, deny the power to enact such legislation as may prevent the intrusion of men into the conjoint pursuit with women of occupations which considerations of decency and morality require should be carried on by the latter separately, and *vice versa*. It is possible that the legislature is not permitted to indulge in an over-refined sense of propriety — amounting to mere sentimentality — and thus exclude females from taking part in honest occupations simply because they have in the past ordinarily been carried on solely by men, and may therefore seem, in the prejudiced eyes of a more fortunate portion of the community, to detract from the modest reserve and retirement of the sex. But when competent legislative authority has declared that the pursuit of certain occupations by females infringes upon public decency, or in its consequences, may involve a violation of public morality, I think the courts can declare the law unconstitutional only when it clearly appears that indecency and immorality are not connected with, nor a consequence of, the prosecution of such occupations by females.

But while I am not prepared to agree that section 18 of article XX of the Constitution prohibits any law or ordinance which would prevent the presence of women as attendants or otherwise at liquor "saloons, bar-rooms," etc., I agree that petitioner should be dis-

charged, because I am of opinion that the ordinance (under which petitioner has been prosecuted) is void, in that it is unreasonable, of ambiguous import, and not of uniform operation. The practice which in effect is declared to be deleterious to the public welfare is the presence of females as waiters or attendants upon the guests at any place where malt, vinous or spirituous liquors "are used or sold," in the presence of females in such places during certain hours of the night. The very presence of females at such places in the night being prohibited, their presence in the capacity of waiters is prohibited. Yet the ordinance contains the exception that where the wife or daughter "may happen to be in attendance," she may pursue without punishment the avocation from her sisters are debarred. The ordinance further prohibits the presence of women at public balls where liquors are sold, provided the ball "is not given for the purpose of evading the provisions of the ordinance." This last clause would seem to prohibit the presence of women at public balls where the dancing is a pretext, and the real purpose is to secure the presence of women where liquor was sold. But if this is its meaning the ordinance again fails of uniformity, since the presence of women or even their service as attendants is not prohibited in places which are not really established with an intent to secure profit from them as "hotels or restaurants or grocery stores," but which take on the outward pretense of such — the object being simply the sale of intoxicating agents.

I concur in the judgment.

Judgment sustained.

MORRISON, C. J., and MYRICK, J., dissent.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

WYMAN V. COLORADO NATIONAL BANK.

(5 Colo. 39.)

Negotiable instrument — bank — lien — bona fide holding.

The plaintiff drew a draft on London, payable to the order of C., a banker, and delivered the draft to C. for collection for his account. C. delivered the draft to defendant bank for his own account, he being in debt to the defendant. After payment, but before defendant received the proceeds, defendant was notified that the draft had been delivered to C. for collection only, and that the plaintiff claimed the proceeds. *Held*, that the defendant was not liable in assumpsit therefor.*

ACTION on a draft. The opinion states the case. The defendant had judgment below.

Radcliffe B. Lockwood, for plaintiff in error.

Charles & Dillon, for defendant in error.

STONE, J. Plaintiff in error (and plaintiff also in the court below), on the 10th day of January, 1877, drew his sight draft on

* Compare *Blaine v. Bourne* (11 R. I. 119), 23 Am. Rep. 429.

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one George G. Dainty, Rugby, England, for the sum of one hundred pounds sterling, payable to the order of George C. Corning; a banker of Boulder, Colorado, and delivered the same to the said Corning to collect and place to the credit of the plaintiff's account at the bank of the said Corning at Boulder. Corning immediately transmitted the draft by letter to the defendant, which letter is as follows:

"BOULDER, COLORADO, *Jan.* 13, 1877.

"WM. B. BERGER, Esq.,

Cashier, Denver.

Dear sir: Your favor of the 12th is received with inclosure as stated. We credit \$10 and your No. 49,788, \$26.15; no protest.

Respectfully yours,

GEORGE C. CORNING,
Thompson.

I inclose for collection and credit my
 No. 2385, Norwood,.....\$100 00
 My No. 2384, Dainty, England,.....£100 00

The draft was indorsed as follows:

"Pay to the order of the Colorado National Bank for account of George C. Corning, Boulder, Colorado."

At the time the draft was thus received by the defendant Corning was indebted to the defendant in the sum of \$10,975.04 for balance of overdrafts.

On the 28th of February the defendant was advised by its New York correspondent that the draft had been paid. A few days previous to this date defendant was informed by telegraph from its said New York correspondent that the latter had been notified by telegraph that the draft belonged to Wyman, who had delivered it to Corning for collection, and that as Corning had failed, Wyman claimed the proceeds of the draft. This notice was before the proceeds had come into the hands of defendant, but after the draft had been paid in London. On the 15th of March plaintiff through his attorneys notified the defendant by letter that he claimed the proceeds of the draft and demanded payment thereof. The exact date of the failure of Corning is not given in the record, but from the testimony referring thereto it appears to have been in the latter part of February. From the evidence preserved in the record it

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appears both by the testimony of Thompson, cashier of the Boulder bank (which was owned by Corning), and by copies of the book accounts of both banks, that the two banks were mutual collection agents, correspondents and depositaries for each in respect to funds collected for and remitted by and to each other, according to the usual course of banking business. The checks of each bank were paid by the other, and transactions embracing collections, checks and remittances of daily occurrence were debited and credited on the books of each, and a settlement of accounts was had upon the first of each month.

By frequent remittances by Corning and credits to his account the balance of nearly \$11,000 against him at the date of the draft in question was gradually reduced, so that at the time he was credited with the proceeds of the draft the balance against him was but little over \$700. Between these dates this balance had fluctuated considerably; for example, on the 17th of January it had become reduced to \$5,111.14, while on the 29th of the same month the amount had increased to \$8,225.63.

Plaintiff brought his action in *assumpsit* on the common counts to recover the amount of the draft. Trial was had to the court and judgment rendered in favor of defendant for costs. Plaintiff brings the record to this court for review, and assigns for error the finding and judgment of the court below upon the facts as we have substantially stated them.

The principal question to be determined is whether upon the facts in the case, the defendant, when he received the draft from Corning, became a *bona fide* holder for value or upon a sufficient consideration, and without notice of any infirmity of title as between antecedent parties, so as to be protected from the equities of the plaintiff.

That one who acquires negotiable paper in good faith for a valuable consideration from one capable of transferring the same becomes a *bona fide* holder, unaffected by prior equities, unless it be shown that he had notice thereof, is a fundamental principle of commercial law.

The indorsement of Corning as payee was sufficient to transfer the legal title of the draft to the Colorado National Bank and vest in it the complete ownership. The possession of the paper by the defendant as such indorsee imported *prima facie* that it was acquired in good faith for full value in the usual course of business before

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maturity, and without notice of any circumstances impeaching its validity; and that such holder was the owner thereof, entitled to recover the full amount against all prior parties. 1 Dan. on Neg. Inst. § 812. And although the burden of proof may be shifted during the course of the trial, yet when such possession is once shown, the burden of proof is then upon the one seeking to impeach any of the elements of validity or rights of the holder which such possession implies. *Id.*

We cannot find that there was any evidence offered to rebut the presumptions fairly arising in favor of the defendant. Receiving the draft in the usual course of business from the payee, who was largely indebted to the bank, and who indorsed the paper "for account" of himself specially, and who transmitted it with directions "for credit" as well as for collection, the officers of the bank so receiving may well have inferred that Corning was the owner of the draft and intended the proceeds to be applied in extinguishment *pro tanto* of his indebtedness to defendant. True, the defendant was notified that plaintiff was the equitable owner of the draft before the proceeds had come into possession of the defendant, but this was unavailing against the right acquired by defendant immediately upon receipt of the draft to retain the proceeds against the balance due from the indorser. *Clark v. Merchants Bank*, 2 N. Y. 384. In volume 1 of his work on Negotiable Instruments, § 283, Mr. Daniel, in treating of the rights of a holder of a negotiable instrument as collateral security for a debt, says: "The test question then is simply this: has there been a change in the legal rights of the parties? If so, the transfer is irrevocable without the holder's consent." Here, as we have shown, the transfer being valid, without notice of prior rights and upon a sufficient consideration, there was a complete change in the legal rights of the parties. The legal title passed from the plaintiff and became vested in the defendant. In respect to the consideration it is well settled by the great weight of authority, that the indorsee of a negotiable instrument received in payment of or as security for a pre-existing debt, is a *bona fide* holder for a valuable consideration and entitled to protection as such. *Allaire v. Hartshorne*, 1 Zab. 665; *Atkinson v. Brooks*, 26 Vt. 569; *Bank of Republic v. Carrington*, 5 R. I. 515; *Brush v. Scribner*, 11 Conn. 388; 29 Am. Dec. 303; *Manning v. McClure*, 36 Ill. 490; *Smith v. Tyson*, 16 Pet. 1.

By the law merchant a banker has a general lien on all securities

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deposited with him by a customer for his general balances, unless there be an express contract or circumstances that show an implied contract inconsistent with such lien, and of this the court will take judicial notice. *Brandas v. Barnett*, 3 Man., G. & S. 530.

In this case there is nothing in the evidence to show that the draft in question was received under special circumstances such as would take it out of the common rule of *lex mercatoria*. The circumstances of the case in *Bank of the Metropolis v. New England Bank*, 1 How. 234, are almost identical with those of the case before us. The New England Bank delivered to the Bank of the Commonwealth negotiable paper for collection. The Bank of the Commonwealth transmitted the same to the Bank of the Metropolis, which latter bank made the collection and retained the proceeds for the balance owing it by the Bank of the Commonwealth, which failed while the funds were in the hands of the Bank of the Metropolis. In reversing the judgment which the New England Bank obtained in the Circuit Court against the Bank of the Metropolis, for the amount of funds collected, Chief Justice TANEY, in delivering the opinion of the Supreme Court of the United States, says: "It is evident that a loss must be sustained, either by the plaintiff or defendant in error, by the failure of the Commonwealth Bank. We see no ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give to the corporation, which was proved insolvent, credit with the plaintiff in error, by the notes and bills which it placed in its hands to be sent to Washington for collection, indorsed in such a form as to make them *prima facie* the property of the Commonwealth Bank, and enabled it to deal with them as if it were the real owner. The Bank of the Metropolis, on the contrary, is in no degree responsible for the confidence which the defendant in error reposed in its agent. When this misplaced confidence has occasioned the loss in question, it would be unjust to throw it upon the bank which has been guilty of no fault or want of caution, and which was induced to give the credit by the manner in which the defendant in error placed its property in the hands of an agent unworthy of the trust." The case coming up again to the Supreme Court, the same learned judge, in laying down the proper instructions which should have been given the jury, says: "But if the jury found that in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable

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paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittance made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank." s. c., 6 How. 662.

The correctness of this rule is affirmed in *Sweeney v. Easter*, 1 Wall. 166, and the same doctrine is held in the case of *Clark v. Merchants' Bank*, 2 N. Y. 380. We think the rules thus laid down apply with peculiar force to the case at bar. The credit here given was in allowing balances to remain in the hands of the Boulder bank, to be met by the proceeds of such negotiable paper, among other remittances, which the evidence shows was from day to day received and applied in the extinguishment of these balances.

There is too in such cases a certain credit given to the debtor, arising out of the forbearance of the creditor in suffering the balances to remain overdue. *Atkinson v. Brooks, supra*; *Bank of Republic v. Carrington, supra*, 552. And this consideration is much stronger in this case, where a large balance was allowed to remain beyond the periodical monthly settlements or statements of account rendered, and where such balance was all on one side. In this, as in all other like cases, there is a hardship in the loss, let it fall upon either the plaintiff or the defendant, but it is an elementary rule that whenever one of two parties must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself rather than the other innocent party. The court below evidently found that the facts in this case bring it within the law which governs in the case of a *bona fide* holder of negotiable paper for value and without notice, so as to discharge the defendant of the equities between the original parties, and as we think the finding was warranted by the evidence, we see no reason to disturb the judgment.

Judgment affirmed.

Boughner v. Meyer.

BOUGHNER V. MEYER.

(5 Colo. 71.)

Wager — "game" — public policy — check — bona fide holding.

A wager as to whether an execution can be collected is not "gaming," nor a wager upon a "game," but is void as against public policy, as between the original parties, but valid as to a *bona fide* transferee of a check given therefor.

ACTION on a check. The opinion states the facts. The defendant had judgment below.

Thomas George and *P. W. Fauntleroy*, for appellant.

E. P. Jackson, for appellee.

THATCHER, C. J. The appellant (plaintiff below) by his complaint, alleges that on the 24th day of August, A. D. 1878, the defendant made his check, whereby for value received, he directed the Colorado National Bank to pay to Isidor H. Kastor, on demand, one hundred dollars, and caused the same to be delivered to the said Kastor on the 4th day of September, A. D. 1878; that said check was duly assigned for value to the plaintiff, and he is the lawful owner and holder thereof; that the same was presented to said bank for payment, and that payment thereof was refused.

The defendant, by his answer, sets up that he made such check upon a wager with said Kastor, whether he (the said Kastor) would collect a certain execution against a partnership firm known as I. Heller & Co. then in the hands of the sheriff of Arrapahoe county, and upon no other consideration whatever.

To the sufficiency of this answer the plaintiff demurred, and the demurrer was overruled.

By chapter 24, section 140, General Laws, p. 299, it is provided that all contracts, promises, agreements, conveyances, securities and notes made, given, granted, executed, drawn or entered into, where the whole or any part of the consideration thereof shall be for money, property or other valuable thing, won by any gaming, or by playing at cards, or any gambling device or game of chance, or by betting on the side or hands of any person gaming, or for the reimbursing, or paying any money or property knowingly lent or advanced at the time and place of such play, to any person or persons so gaming or betting, shall be utterly void and of no effect.

The provisions of this section are very broad and sweeping. Even in the hands of *bona fide* purchasers, negotiable paper founded in whole or in part upon a gambling or gaming consideration, within the meaning of this section, is utterly void.

The language employed is open to no other construction. The protection which the law extends to an innocent holder, who for value in the usual course of trade has received negotiable paper, is of no avail when the statute in terms, or by unavoidable implication, has pronounced the instrument absolutely void. Stricken with nullity at its birth, it can therefore gain no vitality. There is, however, a distinction recognized by the authorities between the *status* of negotiable paper held by a *bona fide* purchaser, where the original consideration is by the courts adjudged to be illegal, and negotiable paper held under like circumstances, when the statute declares such paper to be void.

In *Vallett v. Parker*, 6 Wend. 615, the court says: "Whenever the statute declares notes void, they are and must be so, in the hands of every holder; but where they are adjudged by the court to be so for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with or have had notice of the consideration."

To the same effect see *Weed v. Bond*, 21 Ga. 195; *Glenn v. Farmer's Bank of N. C.*, 70 N. C. 191; *Bayley v. Taber*, 5 Mass. 286; 4 Am. Dec. 457; *City of Aurora v. West*, 22 Ind. 88.

Is the wager in question within the prohibition of the statute? Was the consideration of the check "won by any gaming," within the meaning of the section above quoted?

If the wager was upon any game, the check is absolutely void in the hands of every holder. Horse-racing has been decided to be gaming within the intent of the language here used. The word gaming is held to extend "to physical contests, whether of man or beast, when practiced for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices."

"Such were the Olympic and Nemean games among the Greeks, and Appolinian and Capitoline games among the Romans." *Tatman v. Strader*, 23 Ill. 493; *Shropshire v. Glascock*, 4 Mo. 536; *Boynton v. Curle*, id. 599.

But a wager as to whether an execution can be collected, we are constrained to conclude, cannot be considered as a wager upon any

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game. It would, it is believed, be judicial legislation to hold that money won upon such a wager is money won by any gaming.

The act of March 2, 1864 (Sess. Laws 1864, p. 97, § 3), "To suppress gambling and gambling-houses," extended in terms to all negotiable paper where the consideration was for money "won on any wager;" but the Revised Statutes of 1868 contain the same provisions as the section now under examination, omitting the clause relating "to any wager."

Where the effect of a statute is to make void a certain class of negotiable paper in the hands of innocent purchasers, it certainly should not be extended to cases not fairly within its provisions.

As between the original parties to the wager in question, we are clearly of the opinion that the check was void. Even at common law, a wager against sound policy was not recoverable. That the wager, that a certain execution will not be collected, is in contravention of sound policy, we entertain no doubt. The moment such a wager is made, the one party has a pecuniary interest which might influence him to interfere with the due administration of justice, by seeking to defeat the process of court.

To hold that such a wager is valid, is to encourage unwarranted intermeddling with the mandates of judicial tribunals. Although void as against sound policy, as it is not within the statutory prohibition, the check, in the hands of a *bona fide* holder, for value received in due course of trade, must be protected. By the current of decisions, and in accordance with the recognized policy of commercial law, negotiable paper, where the consideration arises from a wagering contract, will not be declared void in the hands of *bona fide* purchasers, unless so enacted by statute. *Haight v. Joyce*, 2 Cal. 64. Nor is this doctrine thought to be variant from the rule laid down in *Eldred v. Malloy*, 2 Col. 320.

In that case, the wagering contract was held to be void, but whether, if the instrument had been negotiable, it would not have been protected in the hands of a *bona fide* purchaser, was not decided, the court expressly holding that the instrument sued on was not negotiable.

Was the answer which merely set up that which would have been a good defense between the original parties sufficient? If this wagering contract was within the prohibition of the statute, the defendant need not to have alleged that the plaintiff had notice of the illegal character of the transaction, which ultimated in giving the

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check, for in such case, into whose hands soever it might have passed, it was equally void. But this check originating a transaction not within the interdict of the statute is, in the hands of a *bona fide* purchaser, unaffected by the fact that it arose out of an illegal act, and it can be by such holder collected.

In such case the defendant must aver that the plaintiff had notice of the original transaction, leaving the circumstances by which such notice is to be proved, directly or indirectly, to be established by evidence. It is not enough to allege merely that he is not a *bona fide* holder. *Uther v. Riche*, 10 Adol. & El. 411; Dan. on Neg. Inst. 770. And the burden of proving that the check was purchased in bad faith rests upon him who assails the title on that ground. *Goodman v. Simonds*, 20 How. 343; *Swift v. Tyson*, 16 Pet. 1; Redf. & Big. Lead. Cas. on Bills of Ex. & Prom. Notes, 186 *et seq.*, and 239 *et seq.*; Dan. on Neg. Inst., § 1503.

From what we have said it follows that the demurrer to the answer should have been sustained. The judgment will be reversed and the cause remanded, for further proceedings not inconsistent with the views here expressed.

Judgment reversed.

 COLORADO NATIONAL BANK OF DENVER V. BOETTCHER.

(4 Colo. 185.)

Negotiable instrument — check — action by holder against drawee.

No action lies in favor of the transferee of an unaccepted check against the bank on which it is drawn.*

Possession and detention of a check by the bank on which it is drawn, for six days, does not constitute implied acceptance.

ACTION on checks. The opinion shows the facts.

John Q. Charles, for appellant.

Wells, Smith & Bacon, for appellee.

* To same effect, *First Nat. Bk. of Canton v. Dubuque S. W. R. Co.* (28 Iowa, 373), 35 Am. Rep. 280; *Nat. Bk. of Rockville v. Second Nat. Bk. of Lafayette* (69 Ind. 479), 35 Am. Rep. 226, and note, 226.

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BECK, J. The verdict in this case seems to have been directed for the plaintiff, Boettcher, upon the view of the law taken by the District judge that the holder of a check drawn against funds can maintain an action in his own name against the drawee who refuses payment, regardless of the question of acceptance. This is a question upon which courts and law writers are to some extent divided, and much learning has been expended in the discussion of the opposing views taken. Each is supported by arguments of great force, and did we not, from a careful review of all the authorities, deem the question practically settled against the right of action, we should consider it a close and serious question. But every conceivable phase of the question has been discussed; every objection to the rule denying the right of action has been duly considered, and the rule having been adopted and followed by courts of the highest authority upon questions of commercial law, that a right of action does not exist where there has been no acceptance or promise to pay, we do not hesitate to accord to the adjudication the force of an established precedent. The subject has been so exhaustively considered by these authorities that it is only necessary for us to cite them in support of the rule. *Bank of Republic v. Millard*, 10 Wall. 152; *First National Bank v. Whitman*, 4 Otto, 343; *Carl v. National Security Bank*, 107 Mass. 45; *Ætna N. B. v. Fourth N. B.*, 46 N. Y. 82; s. c., 7 Am. Rep. 314; *Case v. Henderson*, 23 La. Ann. 49; s. c., 8 Am. Rep. 590; *Moses v. Franklin Bank*, 34 Md. 580. Other authorities are referred to in the cases cited.

But counsel for appellee rely mainly for an affirmance of the judgment upon the proposition that the evidence shows an acceptance on the part of the bank.

If this be true, then all the authorities are agreed that the check-holder may maintain his action in his own name against the drawee. It is not pretended that there was an express acceptance, but it is insisted that the conduct of the officers of the bank was such as to amount to an implied or conditional acceptance.

Reference is made to 1 Dan. Neg. Inst., § 499, where it is said that "keeping a bill a considerable length of time without returning an answer may, under some circumstances, be considered an acceptance." The doctrine is qualified in the text as follows: "Especially if the drawee be informed that the delay will be so considered, and there be an inference from the language of the drawee that he intended an acceptance. These cases have been de-

cided upon special circumstances, and 'as a general rule the mere detention for an unreasonable time is not considered as amounting to an acceptance.'"

To warrant the inference of acceptance from conduct, it would seem that the circumstances must clearly indicate such an intention on part of the drawee. Thus if he be informed that a detention of the check or bill will be so construed and he thereafter detain it, an intention to be bound as acceptor is implied.

In the case of *Jeune v. Ward*, 1 B. & Ald. 653, the bill was left for acceptance May 29, and retained until the 9th day of July, a period of forty-one days, when the drawee destroyed it. He had previously refused to accept it, but the case does not disclose the time of refusal. Lord ELLENBOROUGH was of opinion that having detained the bill an unreasonable length of time before certifying his refusal to accept, he should be held liable. The other judges were of different opinions however. They considered that the bill having been left with the drawee for acceptance, and not sent by letter, it was the duty of the party leaving it to call for it and inquire whether it was accepted, and not the duty of the drawee to send it back; also that having refused to accept before destroying the bill, the act of destroying could not be construed as an act of acceptance.

In *Mason v. Barff*, 2 B. & Ald. 26, the bill was sent to the drawee by letter, with a request to accept and return. It was detained ten days, and at this time the drawee notified the payees that it was not accepted, because the carrier's receipt for the wool against which it was drawn had not been received, and offered to return it. He likewise stated that the bill was retained by request of the drawers, to hold it until their invoice was received. No answer being received from the payees, it was held sixteen days longer and then returned. A recovery was insisted upon on the ground that the bill had been detained an unreasonable length of time, and that the detention had been at the request of the drawers and without the consent of the payees. Held, that the plaintiff could not recover. The circumstances showed that there was no intention to accept until the invoice or carrier's receipt was received, and the condition never having been satisfied, no liability was incurred.

In *Harvey v. Martin*, 1 Camp. 425, the bill was sent to the drawee with the request to accept and send it to the payee. Two weeks afterward, the request not having been complied with, the

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drawer again wrote the drawee, asking him to accept and return the bill, adding that detention would be considered as equivalent to acceptance. Some time after this the drawee wrote that he had intended to accept the bill, but now refused, as he had no funds of the drawer in his hands. Held, the drawee was liable as acceptor.

In *Koch v. Howell*, 6 W. & S. 350, it was held that the retention of an order until the trial was not conclusive evidence of acceptance, but a question of fact for the jury, since the retention was subject to explanation.

The doctrine of all the authorities cited is that mere detention does not constitute an implied acceptance, and that a conditional acceptance is not enforceable until complete fulfillment of the condition. See Byles on Bills, 191-193; Pars. on Notes and Bills, 284; Edw. on Bills and Prom. Notes, 418; *Liggett v. Weed*, 7 Kans. 273.

The longest detention in the case at bar was for the space of six days. The drawees were not notified that a detention would be considered equivalent to acceptance. There was no promise to pay any of the checks. Until the day on which they were returned, there was not, at any time, sufficient funds on deposit to the credit of the drawers to pay the two checks on which judgment was entered. The act of returning the checks to the Union Bank of Greeley cannot be construed as an intention to accept, for no such intention is indicated, either by the act itself or as taken in connection with the letter of the cashier accompanying the checks; and as regards the explanation of the detention, given by the president of the bank as a witness upon the trial, viz.: that he "supposed they would put up money to meet the whole of them," we cannot assent to the proposition that it is equivalent to a promise previously made, to pay "when in funds."

If the language of the president be formulated into a promise, it would be a promise to pay on condition that the drawers furnished sufficient funds to pay all three of the checks; and since the requisite deposit was never made, the condition was not fulfilled and no liability was incurred. *Liggett v. Weed*, *supra*; *Wintermute v. Post*, 4 Zab. 420.

We are of opinion that the judgment cannot be sustained on the ground of an implied promise, on the present testimony, either upon the authority cited or upon principle. As further testimony affecting the conduct of the appellee may be produced upon another trial, the judgment will be reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

MITCHELL v. HOTCHKISS.

(48 Conn. 2.)

Abatement — penal action — personal liability of officer.

A statute providing that officers of certain corporations shall be personally liable for the debts of such corporations in case they neglect to file an annual certificate of their condition is penal, and an action brought to enforce such liability does not survive. (*See note, p. 152.*)

ACTION to enforce personal liability of officer of a joint stock company. The opinion states the case. The defendant had judgment below.

S. Lucas, for plaintiffs.

J. Halsey and *S. A. Robinson*, for defendant.

LOOMIS, J. This action was originally brought by the plaintiffs, as creditors of "The Star Tool Company," a joint stock corporation located at Middletown, in this State, against Julius Hotchkiss, then in life, but since deceased, to recover the amount of their debt

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contracted during the period that Hotchkiss, as president of the corporation, intentionally neglected to comply with the statutory requirements as to filing with the town clerk of Middletown certain certificates showing the condition of the affairs of the corporation. For the purposes of this case it is conceded that Hotchkiss had by his neglect become liable under the statute referred to. But pending the suit and before trial he died, leaving a will. The plaintiffs thereupon caused to be issued a *scire facias*, summoning his executors into court to show cause why they should not be made parties defendant to the suit. The executors appeared and filed a plea in abatement, on the ground that the action, originally begun against Hotchkiss, did not upon his death survive against them. To this plea the plaintiffs demurred, but the court overruled the demurrer and dismissed the *scire facias*, and the question comes before this court for review by the plaintiff's motion in error.

There is no statute controlling the question under consideration. The only provision is that found in the General Statutes, p. 421, § 6, that "if the defendant in any action shall die before final judgment, it shall not abate if it might originally have been prosecuted against his executor or administrator." To determine the questions whether an action might originally have been brought to charge the estate of Hotchkiss with the statutory liability referred to incurred by him in his life-time, we must invoke the aid of the common law.

The principles of the common law on this subject are embodied in the maxim — "*Actio personalis moritur cum persona.*"

The executor represents the person of the testator, and in legal consequence may be said to continue his existence with respect to all his debts, covenants and contract obligations, which became due during his life or after his death; except such as depend on his personal skill, in which is always implied the condition that the contractor is not prevented from completing his contract by the act of God.

But all private as well as public wrongs and crimes are buried with the offender. The executor does not represent or stand in the place of the testator as to these, or as to any acts of malfeasance or misfeasance to the person or property of another, unless some valuable fruits of such acts have been carried into the estate; and this in strictness constitutes no exception to the rule, for the executor in such case cannot be made liable for the tort of his testator, but

only for the implied promise which the law raises and allows the injured party to put in the place of the wrong.

In the light of these principles we are called upon to determine the nature of the liability imposed by the statute in question.

By section 17, page 280, of the General Statutes, it is made the duty of the president and secretary of joint-stock corporations annually, on or before the 15th day of February or of August, to make and lodge with the town clerk where the corporation is located, a certificate signed and sworn to by them, showing the condition of its affairs as nearly as the same can be ascertained on the first day of January or July next preceding the time of making such certificate, stating the amount of paid capital, the cash value of its real and personal estate and credits, and the name, residence and number of shares of each stockholder.

Section 18, which creates the liability on which this action is founded, is in these words: "Any president or secretary of such a corporation who shall intentionally neglect or refuse to comply with the provisions of the preceding section shall be liable for all the debts of said corporation contracted during the period of such neglect."

We do not see how it is possible to construe this statute as creating or attempting to create any contract relation or duty between the creditors of a corporation and its president. The adoption of such a construction would suggest grave doubts as to the validity of the act which should attempt so arbitrarily to make a debtor out of a stranger to the debt, or in other words to make the debt of one person the debt of another. There was no privity between Hotchkiss and the plaintiffs; they had no transaction with each other and the former owed the latter no private duty from which a promise might be implied.

The argument for the plaintiffs seemed to be based principally upon the assumption that the officers of a corporation are under some original common-law liability to pay all the debts contracted by it while they as officers are in default as to the performance of any of the duties prescribed by statute; that their exemption from personal liability under the corporate organization is not an absolute, but only a conditional one.

This reasoning is fallacious. There may be cases where the organization is so defective that creditors need not recognize it as a corporate being at all, in which case the so-called officers or active

agents in its business transactions may perhaps under some circumstances make themselves personally liable. But conceding the lawful organization and existence of the corporation, the existence of all its members, officers as well as stockholders, so far as its transactions are concerned, become merged in the artificial being, so that in contemplation of law they are utter strangers to those who deal with the corporation; and as stockholders and officers they are never liable except so far as the law makes them liable.

The theory of the plaintiffs' declaration also tends to confute the argument. The action does not profess to be predicated on any promise, original or collateral, express or implied, but is an action on the case founded on the statute. There is nothing in the record to suggest a possibility that the estate of the testator could in any way have been increased or benefited by the misfeasance or non-feasance complained of.

It seems clear that the duty to be performed was a public duty, required by public policy for the general welfare. In the language of Mr. Justice CLIFFORD, in giving the opinion relative to the identical statute we are considering, in the case of *Providence Steam Engine Co. v. Hubbard*, 101 U. S. 188, the act was passed "by the State to enable the business public to ascertain the pecuniary standing of joint-stock corporations."

The willful neglect of the prescribed duty was a public wrong invoking the penalty of the statute; and the statute comes clearly within the definition of a penal one, as given in 2 Bouvier's Law Dictionary, where it is defined as "a statute that inflicts a penalty for the violation of some of its provisions."

The Supreme Court of the United States in the case just referred to, after full discussion, unhesitatingly pronounced this statute a penal one, to be strictly construed as such, and if penal it necessarily follows that the action upon it will not survive the death of the person for whom the penalty was intended, and the executors are not liable. 3 Wms. on Ex. (6th Am. ed.) bottom page 1729; *Hambly v. Trott*, Cowp. 372; *United States v. Daniel*, 6 How. 11.

The view we have taken is well supported by numerous authorities from other jurisdictions.

In *Moies v. Sprague*, 9 R. I. 541, an action was brought to charge the estate of Byron Sprague, deceased, with certain statutory liabilities incurred by the deceased as a stockholder, director and president of the Union Horse Shoe Company, upon certain

promissory notes given by the company to the plaintiff or held by him. The third count was for a liability incurred by the decedent as president of the corporation under sections second and third of chapter 128 of the statutes of the State then in force. Section 2 required the president and directors to make a certificate within ten days after the last installment of capital should be paid in, stating the amount of capital so fixed and paid in, and lodge it with the town clerk for record. Section 3 provided that "if any of said officers shall refuse or neglect to perform the duties required of them as aforesaid, they shall be jointly and severally liable for all the debts of the company contracted after the expiration of said ten days and before the certificate shall be recorded as aforesaid." After full consideration it was decided (DURFEE, J., giving the opinion), that the liability alleged, as founded upon the statute referred to, did not give a cause of action which survived the person affected by the liability or which constituted at law a valid claim against his estate. The statute is so similar to our own that it is impossible to make any distinction in principle between the third count in that case and the present action.

Under a statute of the State of New York providing that "on failure of any company within twenty days from the first of January to make, publish and file an annual report, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," it has been held repeatedly that the act was penal and could not be extended by construction to cases not fairly within its language. *Garrison v. Howe*, 17 N. Y. 458; *Boughton v. Otis*, 21 id. 261; *Chambers v. Lewis*, 28 id. 454. In *Shaler & Hall Quarry Co. v. Bliss*, 34 Barb. 309, it was held that the liability of the trustees under the statute referred to was of the nature of a penalty or punishment for the omission of a duty.

In *Bank of California v. Collins*, 5 Hun, 209, the trustees of the La Abra Silver Mining Company (a corporation) failed to publish an annual report as required, and suit was brought against them on the statute; one of the defendants died pending the action, and the question raised was whether it could be revived against his estate. And although the statutes of New York at the time provided for the survivorship of all actions for wrongs done to the property, rights or interests of another person (except slander, libel, assault and battery and false imprisonment, and actions on

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the case for injuries to the person of the plaintiff or to the person of a testator or intestate), yet it was held, that as the action depended entirely upon the omission to file the annual report, the act had no relation to any right, property or interest of the plaintiff, and was not a wrong done to his property, but was only an act invoking a penalty for a violation of duty to the public and not to any private person, and that it could not be revived against the estate of the deceased trustee.

In *Reynolds v. Mason*, 54 How. Pr. 213, the defendant was a trustee of the Mason Manufacturing Company, and had neglected to file annual reports, and an action was brought on the statute, 3 Edm. R. S. 733, section 12. The plaintiff died, and the administrator petitioned the court for leave to continue the suit in his name, but it was held to be a personal action to enforce a penalty, that did not survive.

In *Hulsey v. McLean*, 12 Allen, 438, a creditor of a New York corporation brought a suit in Massachusetts against a trustee residing there, founded on the New York statute referred to. It was held that the suit could not be sustained because the statute was penal and had no extra-territorial operation.

In *Breitung v. Lindauer*, 37 Mich. 217, a statute provided that if the directors of certain corporations intentionally neglected to make certain annual reports of the condition of such corporations they should be liable for all the debts of the corporation contracted during the period of neglect, and the court held that the liability imposed was in the nature of a penalty, and could not be enforced after the repeal of the clause imposing it, even if incurred before.

Under a similar statute of Indiana the court in *Union Iron Co. v. Pierce*, 4 Biss. 327, came to the same conclusion, and held that a repeal of the statute after the commencement of a suit for a debt so contracted defeated the action.

In *Sturges v. Burton*, 8 Ohio St. 215, the directors of the Sandusky Bank were made by the charter personally liable to the creditors if the debts of the bank exceeded twice the capital paid in, and it was held to be a penalty to vindicate a violation of law.

In *Lawler v. Burt*, 7 Ohio St. 340, an act prohibiting certain associations from issuing bank paper, and making the stockholders liable in their individual capacity for the whole amount of the paper so issued, was held to be a liability in tort in the nature of a penalty and not a liability in contract.

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In *Irvine v. McKeon*, 23 Cal. 472, an act making the directors of a corporation liable for the excess of debts over the amount of capital stock paid in, was held to create a forfeiture or impose a penalty, and therefore to be strictly construed.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

NOTE BY THE REPORTER.— Compare *Flash v. Conn.*, 16 Fla. 428; S. C. 62, Am. Rep. 781. In *Cuykendall v. Miles*, U. S. Circ. Ct., Mass., Jan., 1882, the contrary was held as to the liability of a mere stockholder. LOWELL, J., said: "Then the question is whether such an action can be maintained outside the State of New York. There is a dictum of Mr. Justice CLIFFORD that all such statutes are penal, and can only be enforced in the State which passed them. *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 192. I agree with the plaintiff's argument that the authorities which the learned judge cites decide that point only in respect to officers of corporations made liable for a neglect of duty. *Halsey v. McLean*, 13 Allen, 428; *Derrickson v. Smith*, 27 N. J. 106; *Sturges v. Burton*, 8 Ohio St. 214, etc. Even in such cases the doctrine seems narrow and provincial. If a citizen of Massachusetts assumes the obligations of an officer in a corporation in New York, I see no sound reason for making the courts of Massachusetts a house of refuge from these responsibilities. Still a law which imposes certain duties upon an officer, and makes him responsible in case of neglect for all the debts of a company, without regard to the nature of the default or the amount of the debts, or whether he is a shareholder or is paid for his services, has something penal about it. It was held in one case, and in only one, so far as I know, that where stockholders were made liable to all debts, if the directors failed to file an annual statement of the company's affairs, the statute was penal and to be narrowly construed. It was a domestic controversy and not precisely in point here. *Cable v. McCune*, 26 Mo. 371. I have found no case, and counsel have found none, which holds that a liability of shareholders, as such, is penal. The courts of New York have always held such statutes to be remedial, and so have the courts of the other States, so far as I am informed. *Thompson Stockholders*, §§ 80-86; *Corning v. McCullough*, 1 N. Y. 47; *Carver v. Braintree Manufacturing Co.*, 2 Story, 428. See *Crease v. Babcock*, 10 Meta. 587."

STARKWEATHER V. GOODMAN.

(48 Conn. 101.)

Contract — agency — estoppel.

A builder contracted to furnish materials, and erect a house according to certain plans and specifications, for a certain sum; the materials and work to be approved by a specified superintending architect. On the order of the architect he did extra work which increased the expense and value. When nearly completed he rendered to the owner a written statement of the extras, to which the owner then made no objection. Other extras were subsequently added on the like order. Held that the builder could not recover of the owner for any of the extras. *

* Compare *Martus v. Houck* (20 Mich. 426), 38 Am. Rep. 409.

Starkweather v. Goodman.

ASSUMPSIT. The head-note and opinion state the case. The plaintiff had judgment below.

E. Goodman and F. H. Parker, for plaintiff in error.

A. F. Eggleston, for defendant in error.

PARDEE, J. A. D. Smith made a written contract to furnish all materials and do all the work necessary for the construction of a house for the defendant according to definite plans and specifications and for a fixed sum. O. H. Easton, the architect who drew the plan, was by the contract made superintendent of construction, and all materials and work were to be accepted by him. Easton ordered Smith to make certain changes in and additions to the plan. It is not found that the defendant instructed Easton to make these changes, or that he had knowledge of them until completed. Smith made them and thus increased the cost and value of the house. When completed the defendant took and has since retained possession of it. The plaintiff, as assignee of Smith, brought this action for payment for the labor and materials thus ordered by Easton, and having recovered judgment therefor in the City Court of Hartford, the defendant filed a motion for a new trial.

The contract sets forth the extent of Easton's agency for the defendant; he is only to see that the materials and workmanship are in accordance with the specifications. There remained no opportunity to Smith to extend that power by inference, and when he furnished materials for or performed labor upon the house in excess of the specifications upon the order of Easton, he assumed the risk of ratification by the defendant.

Nor is the defendant estopped from insisting upon this contract limitation upon Easton by the fact that when the house was nearly completed he received in silence a statement of work and materials not specified in the written contract, which included some which he had not ordered; for these had been wrought into the building and were then beyond possibility of withdrawal by Smith, however strongly the defendant might have protested against payment for them. It is very clear therefore that as to these extras Smith was not led into any action resulting in loss to him by the defendant's failing to make the objection.

But it is said that other extras were afterward ordered by Easton

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and furnished by Smith, and that whatever might be the effect of the defendant's silence upon the extras already furnished, he ought to be regarded, by reason thereof, as authorizing the extras afterward ordered. But it does not appear that Smith at that time suggested to him that there might be other extras ordered by Easton or that the matter was thought of by either of them. Besides the question whether the defendant intended to influence the future action of Smith, or was guilty of such gross negligence that he could be chargeable with that intention, and the further question whether Smith was influenced by his conduct, were both questions of fact and not of law, and it is impossible for us to find these facts when the court below has failed to do so.

There is error in the judgment below, and it is reversed.

Judgment reversed.

In this opinion the other judges concurred.

HATCH V. DOUGLAS.

(48 Conn. 116.)

Contract — validity — evidence — usury.

The defendant wrote the plaintiff, a stock broker, to buy him a certain number of shares of a given stock, "on margin," offering a collateral security.. The plaintiff complied, receiving the stock and afterward selling it on the defendant's order at a profit. Similar subsequent transactions resulted in loss, exceeding the value of the collateral. In an action to recover the balance, *held* (1) that evidence was admissible to show the meaning of the words "on margin;" (2) that the contract was valid; (3) that the plaintiff's charging interest on monthly balances, according to the custom of stock brokers, did not constitute usury.

ASSUMPSIT. The head-note and opinion sufficiently show the facts. The plaintiff had judgment below.

O. L. Warner and S. A. Robinson, for plaintiff in error.

S. E. Baldwin and A. W. Bacon, for defendant in error.

CARPENTER, J. The authorities are clear that a contract relating to stocks or other commodities to be performed at a future day, by which the parties contemplate only the payment of the difference in the market value by one or the other, as the case may be, is a mere

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gaming contract and void. So if parties in form contract to sell goods to be delivered in the future, the seller in fact having no goods, and the parties not intending an actual delivery, but contemplating merely a payment of the difference between the market value on that day and the agreed price, it is a gaming contract and cannot be enforced.

Contracts of this nature however are distinguishable from speculating contracts. A man may legitimately buy goods or stocks, intending to sell in a short time and take advantage of an advance in the price if there is one. In such a case he takes the risk of a decline, but that does not make it a gambling contract. And he may purchase goods at a fixed price, to be delivered at a future day, if the parties intend an actual delivery and acceptance. The actual intention may be difficult to prove or disprove; but when once the fact is established one way or the other there is no difficulty in applying the law.

Now there are in the transactions between these parties some of the elements which are usually found in a gaming contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commissions, if the price advanced, and expected to pay that difference if the price declined. To that extent it was a contract for the payment of differences. But it was more than that. The defendant, through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery — not to the principal but to the agents for the principal. The plaintiffs advanced the money and held the stocks in their hands as security. The plaintiffs were ready at any time to transfer the stock to the defendant on payment of the purchase-money. The import of the finding is, and we must so regard it, that it was an actual and *bona fide* employment of the plaintiffs to purchase stocks, and not a mere formal employment designed to cover a betting operation. It does not appear that the plaintiffs assumed any risk. They were entitled to their commissions and interest on their advancements whether the stocks went up or down. The most that can be said of them is, that they knew that the defendant was speculating and that they advanced him money for that purpose. But that was neither illegal nor immoral.

The circumstances relied on to prove the illegality of the con-

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tract are consistent with the claim that it was a legitimate business transaction. It is probably true that dealing in stocks "on margin," as it is called, is fraught with much evil. It encourages speculation and induces many to engage in it who would not otherwise have the requisite means. In that way many people and business generally suffer more or less. But it is an evil that existing laws do not reach. No case has been cited which declares such a contract illegal. If we should so hold it would be difficult if not impossible to draw the line between legal and illegal transactions.

We are of the opinion that there are not in the case before us sufficient reasons for declaring the contract illegal.

The defendant raises a question of evidence. In his letter of June 23, he writes: "I want to buy say one hundred shares Union Pacific stock on margin." What does that mean? Those unacquainted with the business would not understand its meaning from the language. It is not to be presumed that the court understood it. The plaintiffs produced witnesses who were familiar with the business and who knew from experience and observation the meaning attached to the words, to prove their meaning. The defendant objected, but the court admitted the evidence, and we think properly. *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453. It was in the nature of a technical phrase, the meaning of which must be understood before the court could know what the contract between the parties really was.

But it is said that the parties did not understand the phrase alike, the defendant supposing that he risked nothing but the margin, while the plaintiffs understood that he assumed a personal liability as well. The language is that of the defendant. He used a phrase peculiar to the plaintiffs' business, knowing that they would understand its meaning as used in that business. In such cases if the parties did not understand it alike it must be interpreted in the sense in which the plaintiffs understood it. If the defendant chooses to use a technical term which has a clearly defined and well understood meaning in the business to which it relates, and the plaintiffs giving it that meaning act upon it, he cannot be permitted, to the prejudice of the plaintiffs, to say that he used it in a different sense. He left it to be interpreted by usage, and by that interpretation he is concluded. For that purpose usage was properly shown.

But it is said that it is the custom of brokers in their business to

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debit and credit interest monthly, computing interest on balances. This, the defendant says, being compound interest, infects the contract with usury. The contract in its terms is silent on the subject of interest. It is only because the contract was to be performed in conformity with the uniform and established usage of brokers in New York that this claim has any foundation. It will be observed that the usage does not necessarily call for compound interest. If dealings do not extend beyond the period of one month, or if the monthly balances are paid, there is no compound interest. It is only when dealings continue from month to month that it is called for. The question then is this: Is a contract usurious which is legal on its face, but which is to be performed according to a local custom, when that custom in one contingency calls for compound interest? We think not. The vice of usury is not certain; it is only possible. In contracts of this nature the question of interest pertains rather to the remedy than to the contract. It is incidental, and not of the substance of the contract. It is allowed not strictly as interest, but in the nature of damages, although it is commonly called interest, and the amount is determined by the rate of interest where the contract is to be performed.

Viewed in this light the question is whether that part of a custom which contravenes the policy of the law will be enforced. But that question is out of the case, as the plaintiffs waived their claim for compound interest, and judgment was rendered for simple interest only.

There is no error in the judgment.

In this opinion the other judges concurred, except GRANGER, J., who having tried the case in the court below, did not sit.

No error.

NORTON V. SHEPARD.

(48 Conn. 141.)

Limitation — statute of — acknowledgment

"I will pay it as soon as possible," is a sufficient acknowledgment to revive a debt barred by the statute of limitation. (*See note, p. 160.*)

ASSUMPSIT for goods sold. The opinion states the case. The defendant had judgment below.

H. B. Graves and F. E. Cleveland, for plaintiff.

S. B. Horns, for defendant.

LOOMIS, J. Our statutes of limitation do not create an arbitrary bar to the recovery of a debt independent of the will of the debtor. If they did, a new promise would not avail the creditor unless founded on some new consideration, and in such case the action would have to be brought on the new promise. But our courts have always considered them mere statutes of repose, which suspend the remedy, leaving the debt uncanceled and still binding *in foro conscientia*. Hence it is well settled that the debt may be revived and the bar to its recovery removed by a new promise, either express or implied. *Lord v. Shaler*, 3 Conn. 132; 8 Am. Dec. 160; *Bound v. Lathrop*, 4 Conn. 336; 10 Am. Dec. 147; *Austin v. Bostwick*, 9 Conn. 496; 25 Am. Dec. 42; *Belknap v. Gleason*, 11 Conn. 160; 27 Am. Dec. 721; *Phelps v. Williamson*, 26 Vt. 230.

In general any language of the debtor to the creditor, clearly admitting the debt and showing an intention to pay it, will be considered an implied promise to pay and will take the case out of the statute. *Wooters v. King*, 54 Ill. 343; *Gailer v. Grinnell*, 2 Aiken, 349; *Phelps v. Stewart*, 12 Vt. 256. And in this State, an acknowledgment that a debt was once justly due and has never been paid, will ordinarily authorize the triers to infer a promise to pay it. *Sanford v. Clark*, 29 Conn. 460.

In the case at bar the promise of the defendant was, "I will pay them" (referring to the debts) "as soon as possible," and the question is, whether these words constitute a sufficient acknowledgment to take the case out of the statute, in view of the principles above stated.

The defendant insists that the promise referred to was conditional, and that it cannot avail the plaintiff without proof that it was possible for the defendant to pay.

It seems to us that the words "as soon as possible" are too uncertain and indefinite to amount to a condition. They do not point to any future event capable of proof. It is said they mean "as soon as I am able." This would not help the matter unless we assume that general financial ability is intended, which might be susceptible of proof. But neither the words nor the context require this restricted meaning. If the debtor should have insuffi-

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cient property to pay all his debts, it would not follow that it was not possible to pay the debt in question. He might do so perhaps by borrowing the money, by some friendly aid, or by his future earnings. The words do not necessarily imply poverty in the promisor; they might with equal propriety be used by a man of wealth, who at the time had no money on hand, but who had debts of large amount due him or who had other estate not at his immediate disposal. What would be possible for one to accomplish must be exceedingly difficult of proof because it must depend so much on its own exertions. Why the debtor used the language in question does not appear. The language may have been understood by both parties at the time as pointing to a speedy payment. If a man of large estate should use the words the creditor would have a right to expect his money very soon, while if used by another they might afford little encouragement. So that if the promise in question was to be considered express we should incline to hold it unconditional. But the language may be construed as an acknowledgment of the defendant's indebtedness to the plaintiff, and as such it clearly admits the continued existence of the debt and implies a willingness, and even a positive intention to pay it; and the words "as soon as possible" do not really restrict or limit the meaning and force of the acknowledgment. On the other hand they are strong words, implying a lively consciousness of obligation, and an earnest purpose to pay the debt.

There are numerous decided cases which afford strong confirmation of the position we have taken.

In *First Congregational Society v. Miller*, 15 N. H. 520, the defendant's language was, "that he had not the money, but would pay as soon as he could," which was held not to be a conditional promise, because there was no certain event to which the words looked forward, and it was held a sufficient acknowledgment to take the case out of the statute.

In *Butterfield v. Jacobs*, page 140 of the same volume, the defendant said "he would go to work and would pay as fast as he could," in regard to which the court pronounced a similar opinion.

In *Cummings v. Gassett*, 19 Vt. 308, the promise of the debtor was to pay, "as soon as I can," and it was held sufficient to remove the bar of the statute.

In *Sluby v. Champlin*, 4 Johns. 461, the defendant on being arrested by the sheriff promised to "settle with the plaintiff if he

would give him time for payment," which was held sufficient as an acknowledgment.

In *De Forest v. Hunt*, 8 Conn. 180, the plaintiff having written to the defendant, calling his attention to the fact that he had previously sent his account requesting payment, the defendant replied:—"Yours of the 12th inst. came to hand this day, requesting to know what prospects I have of paying the demands against me. I am extremely sorry to say to you that the prospect, at present, is not very flattering, as it is utterly out of my power to pay any thing;" which was held an unqualified and unconditional acknowledgment that the precise balance stated was at that time justly due the plaintiff.

In *Brown v. Keach*, 24 Conn. 73, the plaintiff's agent wrote to the defendant calling his attention to the fact that he was indebted to the plaintiff by note, and the defendant replied:—"Yours of the 24th has been received, and in reply I hardly know what to say; but as you request an answer soon, I will say in return that I can't tell you what I can do at present, but I have been thinking of coming to Woonsocket for some time, but will omit it until I hear from you again. I wish you by return mail to send me true copy of all the claims that you hold against me in full dates; that is, I want it word for word, and indorsements, etc., and state where your mother and sister are now living, and I will see them or write soon." This was held sufficient to remove the bar.

In *Blakeman v. Fonda*, 41 Conn. 561, the debtor said to his creditor—"If you will call in two weeks I will pay you something on the debt; I cannot tell how much;" and the words were held as an unqualified recognition of the defendant's liability to pay the whole debt.

There was an error in the judgment complained of, and it is reversed.

Judgment reversed.

In this opinion the other judges concurred

NOTE BY THE REPORTER. — *Contra*, *Pierce v. Seymour*, 52 Wis. 272; S. C., 38 Am. Rep. 737. In *Elder v. Dyer*, 26 Kans. 604, the defendant wrote and sent a letter to the plaintiff within less than five years next before the commencement of the action on the note, saying, with reference to the note: "A. (meaning his co-defendant) is a queer man about his business and debts; cares but little what you say to him." "You should write him a sharp letter, and demand of him an indorser there," (meaning in Maine, where the plaintiff resides). "I do not want to be held longer on the note." From this letter the court below found that the defendant, by the use of the language contained in the letter, then and there "acknowledged an existing liability" upon the note, and thereby took the

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plaintiff's cause of action against this defendant, out of the operation of the statute, and revived the cause of action against him. *Held*, no error. This was under a statute which makes any acknowledgment of the liability sufficient to revive the debt. The court cite *Bissell v. Jaudon*, 16 Ohio St. 508, under a similar statute, and observe:

"Various and conflicting decisions may be found in the reported cases upon questions similar to this, but scarcely one of such decisions is applicable to this case. They are all founded upon statutes different from ours, or they are based upon theories which have no application in this State. Some of them are based upon the erroneous theory that statutes of limitation as to debts operate as presumptions of payment of the debts, and do not operate as statutes of repose; while in this State all statutes of limitation are considered as operating only as statutes of repose, and not as presumptions of payment. Other decisions are founded upon statutes which provide for taking causes of action on contract out of the operation of the statute only by partial payment, or by a new promise. These decisions hold that no acknowledgment can take a case out of the operation of the statute, unless the acknowledgment amounts in law to a new promise. Of course such is not the law in Kansas. Many of these decisions also go to the extent of holding that the action must be brought on the new promise, and not upon the original debt or claim. Neither is this the law in Kansas. In Kansas, all that is necessary to take a cause of action founded upon contract out of the operation of the statute is that there should be an acknowledgment of 'an existing liability' on the original debt or claim; and then when the action is brought, it is brought not upon the acknowledgment nor upon any new promise, but it is brought upon the original debt or claim. Numerous decisions may be found holding that the slightest acknowledgment of liability is sufficient to take the debt or claim out of the operation of the statute; but as the most of these decisions are founded upon the erroneous theory that the statute of limitations is a statute of presumption of payment, and not a statute of repose, they are not applicable in this State. Probably more decisions of this kind can be found than decisions holding that the acknowledgment must amount to a promise of payment of the debt or claim. But as we have said before, neither of these classes of decisions is applicable in this State. We must simply look to our own statute, although we may possibly receive some light from decisions under statutes of other States, where the statutes are substantially the same as ours. The case of *Hanson v. Towle*, 19 Kan. 373, decided in our own State and referred to by counsel, does not control the decision in this case; and we know of no case that does. Our statute, to revive a debt or claim, requires only 'acknowledgment of an existing liability' on the particular claim in controversy, and this acknowledgment may be in any language which the party making it desires to use. No set phrase or particular form of language is required; any thing that will indicate that the party making the acknowledgment admits that he is still liable on the claim, that he is still bound for its satisfaction, that he is still held for its liquidation and payment, is sufficient to revive the debt or claim; and there is no necessity that there should also be a promise to pay the same, either express or implied. Of course we know that an acknowledgment of an existing liability on an honest debt or claim generally raises an implied promise or contract to pay the same; but whether it does or not is not a question to be considered in this State. The statute says nothing about an implied contract or promise, and the action if revived at all, is not to be brought on the implied contract or promise, but only on the original liability. In the present case the defendant P. P. Elder admitted the execution and existence of the promissory note sued on; he admitted that it was honest and just in its inception and creation; he admitted that it was not paid at the time he wrote the letter to the plaintiff, and he wrote the letter to get an indorser on the note; or in other words, to obtain another surety for the debt, and have himself released, as he in fact was only a surety; and then he says, 'I do not want to be held longer on that note.' Now, taking the entire language of the letter and construing it all together, is it not equivalent to saying, 'I am now held on the note, but I do not wish to be held any longer than it will be necessary for you to obtain a new surety on the debt?' He did not say that he was not liable on the note. He did not refrain from saying any thing about his liability—that is, he was not merely silent with reference to his liability; and then did he not in fact say, although not in the most direct form, that his liability still continued? And if he did say this, it would seem to be all that was necessary to revive the debt."

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In *Boothby v. Bennett*, 78 Me. 117, an agent on behalf of his principal wrote to the creditor: "I am expecting the interest on said note to be paid to me within ten days. In regard to the principal of \$1,000, I have these bonds which I named to you, I understand they are worth a small premium, I think about two per cent above par. I am authorized to let you have the bonds at their market value if you want them; or I will dispose of them to other parties and get you the money. Please inform me by return mail whether you would like the bonds or the money." *Held*, not a sufficient express acknowledgment to bind the agent to an alleged original undertaking of personal responsibility.

In *Junior Steam Fire Engine Co. v. Douglas*, Pennsylvania Supreme Court, March, 1882, it was held that a mere request to delay suit will not toll the statute.

GRAVES V. JOHNSON.

(48 Conn. 160.)

Negotiable instrument — evidence to show relations of parties — limitation.

The plaintiff, at the request of the defendant and for his accommodation, signed as surety a note held by the defendant and payable to his order, upon the secret agreement between them that the defendant would not transfer it, and if the principal did not pay it the plaintiff should not be held. The defendant transferred the note and the plaintiff was compelled to pay it. In an action to recover the amount paid, *held* (1), that parol evidence was competent to show the agreement;* (2) that the plaintiff was entitled to recover thereunder; (3) that the statute of limitations did not attach until the plaintiff was compelled to pay the note.

ASSUMPSIT. The opinion states the facts. The plaintiff had judgment below.

G. A. Hickox, for plaintiff in error.

H. B. Graves, for defendant in error.

GRANGER, J. This action is founded upon a special parol agreement made by the defendant, which was in substance that if the plaintiff would sign the note of Farnum as surety, he, the defendant, would hold it until its maturity and not negotiate it, and that if Farnum failed to pay the note the plaintiff should not be compelled to pay it, provided he would not disclose to Farnum that he was not legally holden as surety for its payment. The plaintiff fulfilled his part of the agreement and did not disclose to Farnum the arrangement between him and the defendant, but the latter violated

* See *Stack v. Beach* (74 Ind. 571), 30 Am. Rep. 112, and note, 116.

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his part of the agreement and negotiated the note to a *bona fide* purchaser. Farnum did not provide for its payment and the plaintiff was sued upon the note by the holder and was compelled to pay it.

The plaintiff signed the note as surety for the sole accommodation and benefit of the defendant and at his special request, and without receiving therefor any consideration whatever. Can there be any reason in law or equity why he should not recover? He has paid his money for the benefit of the defendant, and if any rule of law precludes him from recovering, such a rule is against all reason and justice. The defendant makes no denial that he has had the plaintiff's money, but he says that the law is so that the plaintiff cannot recover; and the rule of law which he relies upon is the old and salutary one that a written instrument cannot be varied or contradicted by parol evidence. We have only to say, as CARPENTER, J., says in the case of *Schindler v. Muhlheiser*, 45 Conn. 154: "That rule has no application to a case like this." It has for its object the prevention of fraud and perjury in those cases where parties have put their contract in writing, by excluding other evidence of the terms of the contract than the writing itself. In fact the case referred to bears a striking analogy to the present, and the reasoning in that case applies well to this. If the defendant can succeed in applying the rule, he makes it an instrument of fraud and wrong and cheats the plaintiff out of an honest and perfectly equitable claim. See the cases cited in that case and in *Thacher v. Stevens*, 46 Conn. 561; s. c., 33 Am. Rep. 39.

The action, as we have seen, is not founded upon the note but upon the agreement made between the parties at the time the plaintiff became surety on the note for the sole accommodation of the defendant, and the contract was good and valid, and was in effect a contract of indemnity to the plaintiff. It was not in writing, and of necessity must be proved by parol if provable at all, which it clearly was. But if the action was upon the note, and Johnson, the payee, was plaintiff, and Graves, defendant, the latter could show by parol the circumstances under which he signed the note, that it was without consideration, and at the request and for the accommodation of Johnson. "Nothing is more common than to introduce evidence of the real and true relation of parties to each other whose names are on negotiable paper, where *prima facie* the position or order of signature makes a contract different

from the true relations of the parties. The proper inquiry is, who among the parties is to pay the debt." ELLSWORTH, J., in *Colgrove v. Rockwell*, 24 Conn. 584.

The claim of the defendant that the plaintiff's claim is barred by the statute of limitations cannot be allowed to defeat the claim. The agreement of the defendant that he would hold the note till maturity and that the plaintiff should not be compelled to pay it, was of course violated by the defendant's negotiation of it soon after it was made, which was on the 1st of August, 1873, and perhaps, so far as his liability to damages for the mere negotiating of the note is concerned, that liability was barred by the statute when the suit was brought on the 21st of August, 1878. It is not necessary for us to consider this point, for the defendant also agreed that the plaintiff should not be compelled to pay the note, and this part of the agreement is set out and relied upon in the special count. This agreement of course was not violated until the plaintiff was actually compelled to pay the note, which was on the 16th of November, 1875, and less than three years before the suit was brought. Besides all this, the agreement had fixed the relation between the parties so that whenever the plaintiff was compelled to pay the note he was paying it at the request of the defendant, and could recover the amount of him as money paid out for him without counting upon the breach of the special agreement. That agreement had created a duty on the part of the defendant to provide for the payment of the note; this was a perpetual duty, and when the plaintiff was compelled to pay it he was paying a debt of the defendant. It was substantially a contract of indemnity, which of course holds good so long as the liability remains against which the indemnity was intended to provide.

There is no error in the judgment.

Judgment affirmed.

In this opinion the other judges concurred

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(48 Conn. 230.)

Sale — of colts to be foaled — delivery.

A contract that all the colts to be foaled by certain mares sold by A. to B., and kept in A.'s stables under B.'s care, were to belong to B. is a valid contract of sale, and not void as against creditors for want of delivery.*

REPLEVIN. The opinion states the facts. The plaintiff had judgment below.

W. K. Townsend and J. H. Whiting, in support of motions.

H. B. Munson, contra.

LOOMIS, J. The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm in this State, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff.

No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin.

The sole ground upon which the defendant claims to hold these colts is that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error.

The doctrine as to retention of possession after a sale has no

* To same effect *Watkins v. Wyatt*, post; *Sawyer v. Gerrish* (70 Me. 234), 35 Am. Rep. 323; *Parker v. Jacobs* (14 B. C., 112), 37 Am. Rep. 734.

application to the facts of this case. A vendor cannot retain after a sale what does not then exist nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If however it needs confirmation, the authorities in this State and elsewhere abundantly supply it. *Lucas v. Birdsey*, 41 Conn. 357 ; *Capron v. Porter*, 43 id. 389 ; *Spring v. Chipman*, 6 Vt. 662. In *Bellows v. Wells*, 36 id. 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff.

In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, *partus sequitur ventrem*, applies.

We waive the consideration of these questions. It will suffice that by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear.

It is true, as remarked in Perkins on Conveyances (tit. Grant, § 65), that "it is a common learning in the law that a man cannot grant or charge that which he has not;" yet it is equally well settled that a future possibility arising out of, or dependent upon some present right, property or interest, may be the subject of a valid present sale.

The distinction is illustrated in Hobart, 132, as follows : "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase is void.

It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to

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grow, the milk that a cow may yield, or the future young born of an animal. 1 Pars. on Cont. (5th ed.), page 523, note *k*, and cases there cited; Hilliard on Sales, § 18; Story on Sales, § 186. In *Fonville v. Casey*, 1 Murphy (N. C.), 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in *McCarty v. Clevins*, 5 Yerg. 195; 24 Am. Dec. 252, it was held that where A. agrees with B. that the foal of A.'s mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born sold and delivered it to D.

[Omitting minor questions.]

There was no error in the judgment complained of and a new trial is not advised.

Judgment accordingly.

In this opinion the other judges concurred.

HULL V. SIGSWORTH.

(48 Conn. 258.)

Sale — delivery — change of possession.

The defendant, in the employment of M. on his farm, agreed to buy of M. a horse then on the farm and apply his wages to the payment. Two years afterward M. sold and delivered the horse to him, taking his receipt in full of wages earned in payment. The defendant continued in M.'s employment on the farm, the horse remained in M.'s stable, the defendant taking care of it, breaking it and shoeing it, paying M. for the feed. *Held*, that title did not pass as against M.'s creditors. *

REPLEVIN. The opinion states the case. Case reserved.

L. Harrison, for plaintiff.

H. B. Munson, for defendant.

**Contra*: *Webster v. Anderson* (43 Mich. 554), 35 Am. Rep. 453.

PARDEE, J. It is found that Rev. William H. H. Murray owned and kept the horse upon his farm for three years prior to May, 1879; that in 1877 the defendant then in his service bargained with him for the purchase of it as soon as he could earn the money to pay for it; that in May, 1879, Murray sold and delivered the horse to him, taking his receipt in full for wages earned in payment; that thereafter he continued in the service of Murray, keeping the horse in his stable and feeding it from his hay and grain as before, paying Murray two dollars and a half per week for the hay and grain; that he took exclusive care of it, broke it to harness and shod it, claiming to own and be in possession of it; and that while so kept it was attached as the property of Murray; and that subsequently the defendant took possession of it under the claim of ownership.

Upon this finding we have the continued ownership and use of the premises by the vendor; the continued employment thereon of the vendee as his servant; the continued care by the latter of the horse, with the others belonging to his employer, feeding all from the stock of hay and grain belonging to him. To the world all things remained unchanged, and it might well be presumed that the continued acts of feeding, shoeing and training, subsequent to the sale, were a part of the duties incident to the continued service. The case of the vendee is not strengthened by the fact that at the time of the attachment the vendor was, and during several weeks prior thereto had been, absent from his farm; his ownership and use continued; the vendee remained the servant of an absent master; there was no visible change in the relation of each to the other; nor in that of either to the property, real or personal. And the declarations of ownership by the vendee, including that made at the time of the attachment, must go for nothing, because the apparently unchanged ownership by the vendor was a constant denial of their truth, and as a matter of law bore them down. So must also his good faith, for in the presence of the facts found the law will not consider it.

In *Norton v. Doolittle*, 32 Conn., 405, this court said: "The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. * * The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible, and continued change of possession. * * And as

in applying the rule we must look beyond the good faith, or the secret, technical features of the transaction, so purchasers must learn and understand that if they purchase property and without legal excuse permit the possession to remain, in fact, or apparently and visibly, the same, or if changed for a brief period, to be in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the vendor, as still, to the view of the world, and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property."

The case of *Elmer v. Welch*, 47 Conn., 56, had not been published when this case was argued, and therefore was not cited by the counsel on either side. We now refer to it only that it may be understood that it has not been overlooked by us in the determination of this case. The facts of that case were in many respects like those of this, but there was this all-important fact there which does not exist here, and which was decisive of the case in favor of the vendee — that the real estate, with the barn in which the horse that had been sold was kept, was conveyed, at the time of the sale of the horse, by the vendor to the vendee, and was at the time of the attachment of the horse by a creditor of the vendee, in the exclusive possession of the vendee, although the horse was taken care of by the same persons previously in the employment of the vendor, and in part by the vendor himself. The deed of the premises had been duly recorded, and the grantee was in open and exclusive possession of them.

In his writ the plaintiff described himself as trustee, without naming his assignor in insolvency or stating the character of the assignment. We advise the court of Common Pleas to render judgment for the plaintiff upon his amendment of the writ in this respect.

In this opinion the other judges concurred.

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HINE v. ROBERTS.

(48 Conn. 267.)

Sale — lease of organ.

An organ was delivered on a written agreement for a specified "rent," part of which was paid in a melodeon delivered by the vendee, and part in a note executed by him, payable in about two years, "with the understanding that if I shall have punctually paid all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ." The organ having been returned, *held*, that no action could be maintained by the vendor on the note, the transaction being not a lease, but a conditional sale.

SUFFICIENTLY reported, *ante*, 22.

SHAW v. SMITH.

(48 Conn. 306.)

Sale — of article to be manufactured — title — delivery.

Where one contracted for articles to be manufactured, and to pay the price partly in installments during the progress of the work, and the balance on completion, and the manufacturer fraudulently representing that the work was substantially completed obtained the price in full, without delivery, and then made an assignment in insolvency, *held*, that title had not passed as against creditors. (*See note*, p. 173.)

REPLEVIN. The opinion states the case. Case reserved.

S. Lucas, for plaintiffs.

G. C. Ripley, and *J. Halsey*, for defendant.

PARK, C. J. One Corbett agreed with the plaintiffs to make for them a complete set of special tools adapted to the manufacture of the Wardwell sewing machine, for a specified sum, to be paid as the work progressed. When Corbett had completed a part of the set of

tools, and another part was partially completed, and still another part was in the rough, he became insolvent, and made an assignment of all his property to the defendant for the benefit of his creditors. At the time of the assignment the plaintiffs had paid him the entire contract price for the tools, although none of them had been delivered to them. The last payment of \$500 was procured from them by fraudulent representations made by Corbett that the set of tools was substantially completed.

These are the principal facts, and the question is, do they make out a case for the plaintiffs?

We think it is clear that the title to none of the tools ever became vested in the plaintiffs. None of them had been delivered, accepted, or inspected by them. The tools were required by the contract to be of a certain quality, and capable of manufacturing fifty sewing machines per day. If they should not answer the contract the plaintiffs were not bound to receive them. Hence they required inspection and acceptance under the contract before title to them would pass to the plaintiffs. Indeed the plaintiffs had the right to insist that the entire set of tools should be put to the test in order to ascertain whether they were capable of manufacturing fifty sewing machines per day, before they were bound to accept any of them. The set of tools was an entirety. When completed, each tool would perform its particular function, like the different wheels and movements of a complicated machine. There is nothing in the case which tends to show that up to the time of the assignment the plaintiffs did not insist upon all their rights under the contract. Indeed it is to be presumed that they did until the contrary appears; the finding in this case therefore shows no title in the plaintiffs to any of the tools, even as between themselves and Corbett.

This is clearly the proper view of the case on principle, and it is supported by the decided cases on the subject. What the court said in the case of *Clarke v. Spence*, 4 Ad. & El. 448, is applicable here: "On the part of the plaintiffs it was not denied in argument, nor could be according to decided cases and known principles of law, that in general under a contract for the building a vessel or making any other thing not existing in specie at the time of the contract, no property vests in the party, whom for distinction we will call the purchaser, during the progress of the work, nor until the vessel or other thing is finished and delivered, or at least ready for delivery, and approved by the purchaser; and that, even where the con-

tract contains a specification of the dimension and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days. The builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but may if he pleases dispose of that to some other person and deliver to the purchaser another vessel or thing, provided it answers to the specifications contained in the contract."

Judge SWIFT, in his Digest (1 Swift Dig. 379), says: "If a person contracts with another for a chattel not in existence, but to be made for him, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him."

In the case of *Williams v. Jackman*, 16 Gray, 514, BIGELOW, C. J., says: "Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready to be delivered. This is the general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract."

In the case of *McConihe v. New York & Erie R. R. Co.*, 20 N. Y. 495, the plaintiff agreed, for a specified price, to build and deliver certain cars to the defendant, who was to furnish iron boxes necessary to their completion. They were completed, except so far as prevented by the default of the defendant in not furnishing the boxes, when they were destroyed by fire, in the possession of the plaintiff, and without his fault. Judge GROVER, in giving the opinion of the court, says: "This was in effect an agreement for the sale of the cars, thereafter to be constructed by Mallory (the plaintiff's assignor), to the defendant, and did not vest any property in the defendant until the cars were completed and delivered." This was a case of extreme hardship, but still the court rigidly adhered to the rule of law on the subject.

See also the case of *Andrews v. Durant*, 1 Kern. 35, where all the authorities on this point are cited and very ably reviewed.

Again, the tools manufactured were never taken possession of by the plaintiffs, neither does the contract contemplate that possession should be delivered to them until after certain machines should be manufactured by Corbett for them; hence a sale of these tools would be void so far as creditors were concerned, even if there had been a sale of them to the plaintiffs and title to them had passed

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between the parties. The assignee represents the creditors, and could make void such sale as effectually as creditors could have done had they attached the property. The assignment in this case was a statutory sequestration of the property for the benefit of all the creditors of Corbett. This doctrine has been repeatedly declared in this State, and it is too well established for controversy. *Shipman, Trustee, v. Etna Ins. Co.*, 29 Conn. 245; *Swift v. Thompson*, 9 id. 63; 21 Am. Dec. 718; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Root v. Welch*, 28 Conn. 157; *Hall v. Gaylor*, 37 id. 550. And many other cases to the same effect might be cited.

The plaintiffs insist that the fraud by which Corbett procured the last payment of \$500 from the plaintiffs, by falsely representing that the set of tools was substantially manufactured, estops him from denying the truth of those representations, and also estops the defendant, who is his assignee, from making a like denial, on the ground that the latter could take no greater rights than Corbett himself had at the time of the assignment. Hence it is claimed it must be taken as true that at the time the last payment was made the set of tools was substantially completed.

But would such fact in the case alter its character? Even then the set of tools would not be constructed and ready for delivery; much less would they be actually delivered, or inspected and approved as finished articles, as the cases which we have cited require. Nor would such fact in the case answer the law, which requires a change of possession in order to make a sale of chattels good as against creditors.

We advise judgment for the defendant.

Judgment affirmed.

In this opinion the other judges concurred.

NOTE BY THE REPORTER. — The English doctrine is the other way. Founded on a dictum in *Woods v. Russell*, 5 B. & Ald. 912, it was reluctantly accepted in *Clarke v. Spence*, 4 A. & El. 443, and as Mr. Benjamin says (Sales, § 837), "has remained unshaken to the present time." But it has never been accepted in this country, but has repeatedly been expressly repudiated. PARKER, J., says, in *Andrews v. Durant*, *supra*. "It has never yet been followed in this country," and DENIO, J., says, "the modern English rule is not founded upon sufficient reasons, and ought not to be followed." To the same effect, *Briggs v. A Light Boat*, 7 Allen, 287, and dicta in *Sundford v. Wiggins Ferry Co.*, 27 Ind. 522; *Lang's Appeal*, 81 Penn. St. 18; *Scull v. Shakespeare*, 75 id. 297.

In *Elliott v. Edwards*, 6 Vroom, 265, the court said: "The English cases before the Revolution uniformly hold that where a builder agrees to furnish the materials and build a vessel or other thing not in case, to be paid for in installments as the work progresses, it is a contract for work and materials and not a contract of sale, and that the title remains in the builder until the work is completed and delivered.

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"In *Mucklow v. Mangies*, 1 Taunt. 318, where the whole price was paid in advance, and the name of the person for whom the vessel was built was painted on her, the title was held to remain in the builder.

"In *Towers v. Osborn*, the defendant set up the statute of frauds in aid of his refusal to take a chariot which was built for him upon his verbal order, but Chief Justice PRATT ruled that it was not a contract for the sale of goods, and the plaintiff had recovery.

"This case was followed by Lord ELLENBOROUGH in *Graves v. Buck*, 8 M. & S. 173, and was not departed from until a different doctrine was announced in *Woods v. Russell*, 5 B. & Ald. 943, in 1822; and in some of the English cases since that date which have recognised *Woods v. Russell* as authority, it is acknowledged that it is difficult to reconcile that case with the established principles.

"The New York and Massachusetts cases are in full accord with the early English cases. *Merrill v. Johnson*, 7 Johns 473; 5 Am. Dec. 289; *Gregory v. Stryker*, 2 Denio, 628; *Johnson v. Hunt*, 11 Wend. 139; *Andrews v. Durant*, 11 N. Y. 85; *Mizer v. Howarth*, 21 Pick. 205; *Spencer v. Cone*, 1 Metc. 233.

"These cases have been followed in our own State in the recent case of *West Jersey R. Co. v. Trenton Car Works*, 3 Vroom, 517, which declares the rule to be that in the case of an executory contract for the sale of an article not in existence, but to be manufactured, and where the contract price is advanced, no title passes until the thing is completely finished and delivered, or set apart for and accepted by the orderer."

MERRILL V. KENYON.

(48 Conn. 314.)

Agency — undisclosed principal — election.

Where one sells goods to another, who informs him that he is buying as agent for a third, but does not disclose his principal's name, and the seller does not require the name, nor know who the principal is, but takes the agent's note for the price, he may still elect to hold the principal.*

ASSUMPSIT. The head-note and opinion show the facts. The plaintiff had judgment below.

S. Lucas and G. C. Ripley, for motion.

S. S. Thresher and F. T. Brown, contra.

PARK, C. J. No complaint is made of that part of the charge in which the court instructed the jury, that if the plaintiffs did not know at the time of the sale that Hoyle was acting as agent, and as soon as they discovered that he was so, elected to make his principal their debtor, they had a right to recover, and that they were not obliged to make their election upon a mere rumor, but had a right to have reliable information to act upon; but exception is taken to

*See *Cobb v. Knapp* (71 N. Y. 348), 27 Am. Rep. 51.

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that part of the charge in which the judge said, "If the plaintiffs knew, while they were furnishing the goods, that Hoyle was an agent, but did not know whose agent he was, the same rule applied as if they did not know he was an agent at all."

The case of *Thomson v. Davenport*, 9 B. & Cress., 78, fully sustains this charge of the court. In that case the party buying the goods represented at the time of making the contract of sale, that he was buying them on account of certain persons residing in Scotland, but did not mention their names, and the seller did not inquire who they were, but debited the agent who purchased the goods. It was holden that the seller might afterward recover the value of the goods from the principals. Lord TENTERDEN, C. J., in giving the opinion of the court, said: "At the time of the dealing for the goods the plaintiffs were informed that McKune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but he was not informed who the principal was. They had not therefore at that time the means of making their election. It is true that they might perhaps have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that the case falls in substance and effect, within the first proposition which I have mentioned—the case of a person not known to be an agent—and not within the second, where the buyer is not merely known to be an agent but the name of his principal is also known." In the same case BAYLEY, J., remarked as follows: "In the present case the seller knew that there was a principal; but there was no authority to show that mere knowledge that there is a principal destroys the right of the seller to look to the principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made." In the same case LITLEDALE, J., remarked: "Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation as if at the time of the contract he did not know that there was any principal besides the person with whom he was dealing, and had afterward discovered that the goods had been purchased on account of another; and in that case it is clear that he might have charged the principal. It is said that he ought to have ascertained, by inquiry of the agent, who the principal

was, but I think he was not bound to make such inquiry, and that by debiting the agent with the price of the goods he has not precluded himself from resorting to the principal whose name was not disclosed to him."

The case of *Raymond v. Crown & Eagle Mills*, 2 Metc. 319, is to the same effect. It was there held that "there must be actual knowledge, on the part of the vendor, of the relation of the parties and their interest in the matter, to exonerate the principal by giving credit to the agent."

Complaint is also made of that part of the charge in which the judge said to the jury that "even if the plaintiffs took the notes as payment, but did not have reason to know at the time that Hoyle was the agent of the defendant, then unless the notes were paid, on discovering that fact they were still entitled to look to the defendant."

Surely the plaintiffs would not be bound by an agreement to take the notes of Hoyle in payment without any knowledge of the fact that Hoyle was the agent of the defendant, any more than they would be bound by their charge of the goods to him believing him to be the principal. The plaintiffs were entitled to the right of an election to charge the defendant, and no agreement they might make with Hoyle, under a misapprehension of the true character of the party with whom they were dealing, could deprive them of that right. The reason why a party is not bound, when he charges the agent believing him to be the principal, is the want of knowledge that another is the buyer in fact. The same principle must prevail in a case where the agent's notes are taken without that knowledge.

And it is well settled that the taking of the promissory note of a debtor for an antecedent debt is not of itself payment. *Davidson v. Bridgeport*, 8 Conn. 472; *Bill v. Porter*, 9 id. 23; *Freeman v. Benedict*, 37 id. 559.

The defendant further complains of the refusal of the court to charge the jury, as requested by him, "that if the plaintiffs knew that Hoyle was an agent, and then received his notes, the presumption is that they were received in payment of the original bill, and that he elected Hoyle as his debtor."

We have already seen that the bare fact that the plaintiffs knew that Hoyle was an agent of some one in the transaction, was not enough to distinguish the case from that class of cases where such

Trubee v. Miller.

knowledge does not exist and sellers deal with agents supposing they are principals. Such being the case, it is clear that the court committed no error in refusing to charge as requested by the defendant. The cases already cited show that the facts stated create no such presumption as that claimed.

A new trial is not advised.

In this opinion the other judges concurred.

TRUBEE v. MILLER.

(48 Conn. 347.)

Landlord and tenant — recovery by disseisee against tenant of disseisor.

A disseisee, lawfully recovering possession, may maintain trespass for mesne profits against the disseisor's tenant, notwithstanding the latter has in good faith paid the rent to the disseisor. *

TRESPASS for mesne profits. The opinion and head-note show the facts. Case reserved.

W. K. Seeley and E. W. Seymour, for plaintiff.

J. B. Curtis and N. R. Hart, for defendant.

PARDEE, J. The defendant contends that this action is trespass *quare clausum fregit*; that possession by the plaintiff at the time of the injury is a pre-requisite to the maintenance of that action; and that this plaintiff was barred from possession during the entire time of occupancy by the defendant, and that therefore she must fail in her suit.

But while in form this is an action of trespass, being consequent upon and supplemental to the action of ejectment, and therefore necessarily partaking of its characteristics, in effect it is to recover the rents and profits of the estate, and although the right to institute it was in suspense until the plaintiff had regained actual possession, the law then supposes the freehold to have been continuously in the rightful owner by a kind of *jus postliminii*, and gives her the action for the damages or mesne profits during the time of

* Compare *Dwinnell v. Brown* (65 Ga. 438.) 38 Am. Rep. 798.

tortious dispossession ; thus avoiding the application of the rule cited by the defendant, and attaining justice through a fiction.

It was within the power of the plaintiff to include mesne profits in the judgment in the action of ejectment ; and it was equally within her power to take only nominal damages for the trespass, enter a remittitur, and institute an action against the defendant for such part of the profits accruing during the time of the disseisin as he actually took to himself.

This action rests upon the plain principle that he who occupies the land of another shall compensate the owner therefor, even if he occupied by virtue of a lease from, and paid rent to, one who was apparently in possession claiming title, and whom he in good faith, but mistakenly, believed to be the rightful owner. For as between two persons, equally without fault, each should bear the loss or risk of loss resulting from his own mistake.

This principle had judicial recognition at least as early as *Holcomb v. Rawlins*, Cro. Eliz. 540, determined about 1596. That was trespass *quare clausum fregit* ; the defendant pleaded “ that, long before, Thomas Clerk was seised in fee, and let to him for years, and gives color to the plaintiff ; the latter replied that he was seised until by the said Thomas Clerk disseised, who let to the defendant ; that the plaintiff afterward re-entered and the trespass mesne betwix.” The defendant demurred ; judgment for the plaintiff, the court saying that by his re-entry “ he is remitted to his first possession, and as if he had never been out of possession ; and then all who occupied in the meantime, by what title soever they come in, shall answer unto him for their time ; as if a disseisor had been disseised by another, the first disseisee re-enters, he shall in trespass punish the last disseisor ; for otherwise it would be mischievous unto him, for after his re-entry he shall have no remedy for his mesne profits. And it is not to be doubted but that the disseisee after his re-entry shall punish the second disseisor and the servant of the first disseisor who occupied under his master ; which was not denied by any ; and by the same reason he shall punish him who comes in by title, for that is now as a trespass done unto himself.

Doe v. Whitcomb, 8 Bing. 46, decided in 1831, was trespass for mesne profits. There was a judgment in ejectment against Simon Payne ; the plaintiff had seisin by execution ; the defendant had occupied the premises for a year, having been let into possession

by an agent of Payne, to whom he had paid the rent. It was objected that the defendant was not thereby sufficiently connected with Payne to render him liable to this action for mesne profits. The verdict was taken for the plaintiff, with leave for the defendant to move the court on the point. TINDAL, C. J. : " We entertain no doubt on the case. The evidence was, a judgment in ejectment against Simon Payne ; the execution of a writ of possession thereon ; that the defendant came in under Simon Payne and had possession for a certain time, and paid rent to a certain amount. The only objection to the verdict is, that the defendant is a stranger to the record in ejectment against Payne. The answer is, that the defendant came in under Payne while the judgment in ejectment was pending, and that he cannot hold by a better title than Payne."

Emerson v. Thompson, 2 Pick., 473, was trespass for mesne profits. The plaintiff having recovered judgment against the administrators *de bonis non* of the estate of John Harris, deceased, upon March 30, 1818, levied his execution upon certain land, and immediately made a lease thereof to Brown, who was already in possession as purchaser from the administrators. Before the levy of the plaintiff's execution, W. Thompson, the father of the defendants, had recovered judgment for the premises in a writ of *entry sur disseisin* against Brown, and on May 8, 1818, he executed his *habere facias seisinam* and expelled Brown, then in possession under the plaintiff's lease. W. Thompson died November 16, 1818; the defendants were his heirs-at-law and administrators upon his estate. On May 20, 1819, in his latter capacity, W. Thompson, the defendant, leased the premises for one year; and it did not appear that he or any other of the defendants had at any time before entered thereon after the death of their ancestor. On May 21, 1819, the plaintiff brought his writ of ejectment demanding seisin of, etc., " into which the said defendants have not entry but by W. T., etc., deceased, who thereof unjustly disseised the plaintiff, and from whom the same descended to the defendants, who still unjustly withhold the same," etc.; plea " that they never disseised in manner and form." Verdict of judgment for the plaintiff, with the writ of seisin duly executed. Held, " that the heirs were liable in trespass for the mesne profits accruing after the commencement of the writ of entry (and so, it seems, they would have been, if they had been purchasers), but not for those accruing between the de-

sement cast and their entry. As to these accruing between their entry and the commencement of the writ of entry : *Quære.*"

In *Green v. Biddle*, 8 Wheat. 1, it is said that "nothing in short can be more clear upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant; or which clogs his recovery of his possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property." In *Storch v. Carr*, 28 Penn. St. 135, it is said that "intermeddling with real estate by putting a party in possession and afterward making a written lease of it to other parties makes the parties so interfering liable with the parties occupying the premises for mesne profits." In *Bradley v. McDaniel*, 3 Jones, 128, it is said that "one coming in as a lessee to the defendant in an action of ejectment during the pendency of that action, is bound by the proceedings had therein, and consequently is liable to an action for mesne profits." In *Judson v. Stone*, 13 Johns. 448, it was held "that when during the pendency of an action of ejectment the defendant gives up the possession to a third person, and afterward the plaintiff recovers judgment, such third person is liable for the mesne profits," and in *Morgan v. Varick*, 8 Wend. 587, "that a disseisee, after recovering possession may maintain trespass for mesne profits against the disseisor, or his servants, or a stranger acquiring title from the disseisor."

It is true that the principle has not had the unanimous support of courts in England or this country. In *Liford's case*, 11 Coke, 51 (1615), there is a dictum of Lord COKE, C. J., to the effect that the disseisee after re-entry cannot recover in an action for mesne profits against the feoffee or lessee, or disseisor of the first disseisor, giving as reasons that "this fiction of the law, that the freehold continued always in the disseisee, shall not have relation to make him who comes in by title a wrong-doer *vi et armis*;" that "it is to be presumed that the feoffee has given consideration or recompense to the disseisor, and that the lessee has paid rent to him, or other consideration, and therefore in reason the disseisor is to be charged with the whole;" and in respect to the disseisor of the disseisor that the "fiction of law as to the action extends only to the first disseisor, and if the disseisee should punish the

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second disseisor he would be twice charged." Lord COKE refers to several ancient cases in support of his opinion, acknowledging that "there was a great variety of opinions in the books" upon the point. See *Symons v. Symons*, Hetley, 66; Viner's Abr., Trespass, R. 4, pl. 5; Bro. Abr. Trespass, pl. 35; Keilway, 1, pl. 2; see also *Sanderson v. Price*, 1 Zab. 637. In 2 Roll. Abr. 554, Trespass per Relation, the law is declared to be as laid down in *Holcomb v. Rawlyns*, *supra*, in Gilbert's Tenures, 47, 50, and in Comyn's Digest, Trespass, B. 2. Buller in his Nisi Prius, 87, speaking of the doctrine of *Liford's* case, says "it may admit of doubt, for there are cases to the contrary, and the reason of the law seem to be with them." In *Emerson v. Thompson*, *supra*, WILDE, J., says: "So far therefore from feeling myself bound by *Liford's* case as an authority, I am of opinion that the weight of authority is opposed to the decision in that case; and that this is the opinion also of the English courts may be inferred from their well-known practice in relation to the action for mesne profits consequent to a recovery in ejectment."

The record finds that in the month of July, 1874, the defendant had actual knowledge that there was litigation between Georgia V. Alden and the plaintiff as to the title to and the right to the possession of the premises, and it is not found that he had previously paid any portion of the rent reserved for the term. Having taken no precautions against the results of a possible judicial determination that the person under whom he held had no title to the premises, and no right of possession thereof, and could confer none upon him, he is not now to be heard to complain that he has paid rent to her. Upon knowledge it was for him to be diligent in inquiry as to his rights and duties, and in protecting himself against double payment. It was not his privilege simply to pay and then transfer all risk of loss from himself to the plaintiff.

It is not an answer to her demand that he has come under an obligation, from which he cannot relieve himself, to pay rent to the disseisor; that was his voluntary act and his misfortune. Neither in law nor equity are the rights of the plaintiff, she being without fault, to be conclusively determined thereby.

Moreover the plaintiff had placed upon record a duly executed deed of the premises to herself. From the date of such record the defendant had constructive notice as to the state of the title; from that date the plaintiff was entitled to the protection given, and the

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defendant was subject to the limitations imposed thereby. His payment of rent to a disseisor was without excuse or any element of equity; it has not ignorance for its justification.

But we do not think it essential to the plaintiff's right of recovery that the defendant should be chargeable with notice of her claim at the time he leased the premises of Mrs. Alden, nor that he paid the rent to his lessor in circumstances that should have put him upon inquiry, nor indeed that the plaintiff should have brought an action of ejectment to recover possession; but we base our decision upon the broad principle, clearly supported by the authorities, that a disseisee who has recovered possession of the premises from the disseisor, in whatever lawful mode, may when in possession maintain trespass for mesne profits, against a tenant of the disseisor or any one else who has occupied under him, for the use and occupation of the premises, whether such occupant had any knowledge of the claim of the disseisee or had not.

It being found that the sum of \$2,500 will compensate the plaintiff for the use and occupation of her land for each of the years 1874 and 1875, and \$2,000 for the year 1876, the Superior Court is advised to render judgment in her favor for the aggregate of those sums with interest upon each from the end of the term for which it is payable.

Judgment accordingly.

In this opinion the other judges concurred.

GALLAGHER V. DODGE.

(48 Conn. 387.)

Injunction — malicious erection on one's own land.

A. and B. were rivals in business and occupied adjoining stores on a city street, there being no space between their buildings. A's store came up to the street line; B's was a few feet back with an intervening platform. A plate glass window had been placed in the wall of A's store looking over B's platform, and A. used it in displaying his goods. B. had a show case made to place upon his platform in front of this window, his object being primarily, to display his own goods, and secondarily, to cover A's window and to annoy and injure him in the use of his store. *Held*, not to be a case for an injunction under the statute forbidding malicious erection to annoy and injure adjacent proprietors.*

* See *Phelps v. Nowlen* (72 N. Y. 39.), 23 Am. Rep. 98.

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ACTION for injunction. The head-note and opinion show the facts. The plaintiff had judgment below.

T. E. Doolittle, for plaintiff.

S. E. Baldwin, for defendants.

LOOMIS, J. This is a petition for an injunction under the statute (Gen. Stat. p. 477, sec. 4,) which provides that "an injunction may be granted against the malicious erection by an owner or lessee of land of any structure upon it intended to annoy and injure any proprietor of adjacent land in respect to his use or disposition of the same."

The structure which it is sought to enjoin the defendants against erecting, is a show case in front of their store and upon their own premises, but to be so placed as to obstruct a side window in the plaintiff's store, which store projects several feet beyond that occupied by the defendants, and thus has space for a side window looking out upon the platform constructed from the front of the defendants' store to the street line. This side window is upon the line between the premises of the two parties, and serves the occupant of the plaintiff's store both for light and for the display of his goods.

It is found that the object of the defendants in procuring the show-case was two-fold — first, to display their own goods to the best advantage; and second, to prevent the public from seeing the goods of the occupant of the plaintiff's store through his side window.

It was the right of the defendants, and the exercise of the right could not be regarded as unreasonable to occupy the space between the front of their store and the street line in the way most advantageous to their business. They were under no obligation to consult the interests of an adjoining proprietor. So far as he was availing himself of the open space to secure to himself more light by a window looking out upon it, or an opportunity to display his goods by exposing them in the window, he was availing himself of an opportunity that he held, and must have known that he held, by mere sufferance, for the defendants' store could at any time have been built out in front up to the street line, and so as completely to darken his side window, with no invasion of his rights and no ground of complaint on his part. If possibly a building

line established by the city would have prevented them from building out to the street line, the mere fact that the plaintiff's building was erected before the building line was established was one that gave him no rights against the defendants as to the open space in front of their premises. What they might have done so effectually by building out over this space they had an equal right to do in any other mode no more injurious to the adjoining proprietor. We cannot see why they might not reasonably do it in the mode which they adopted.

But it is claimed that the whole character of the act as to its legality is changed by the fact that an element of malice went into it. And this brings us to the difficult question where the line shall be drawn between structures that are useful and proper in themselves, but into the erection of which a subordinate malicious motive enters, and those where the malicious intent is the leading feature of the act, and the possible usefulness of the structure a mere incident.

The only case in which this statute has come up for construction is that of *Harbison v. White*, 46 Conn. 106, in which it was held that a coarse structure erected for the malicious purpose of darkening the windows of a neighbor fell within the intent of the statute, although it might serve a useful purpose in screening the defendants' premises from observation. Here the malicious purpose was altogether the predominant one, and the usefulness of the structure very limited and merely incidental. In the present case these conditions are reversed, and it is found that the primary purpose was the reasonable and proper one of displaying the defendants' goods, while the malicious part of the motive was secondary. While we are not prepared to say that this relation of the two motives should always determine the court against the granting of an injunction, and the opposite relation in favor of granting one, yet we regard the predominance of the malicious motive as generally essential to a case in which the court will think itself justified in interfering. The statute speaks of the structure intended as a "malicious erection," and one the intent of which is "to annoy and injure any proprietor of adjacent land." We think we do not go too far in saying that this malicious intent must be so predominating as a motive as to give character to the structure. It must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental. The law regards with jeal-

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ousy all attempts to limit the use to which a man may put his own property. This right to use is always subject to the wholesome limitation of the common law, that every one must so use his own property as not to injure another's, and the person who violates this rule is liable to the person injured whether he has any malicious intent or not; but here the new principle is introduced, that the land owner may erect no structure on his own premises, however lawful it would otherwise be, if he does it maliciously with intent to annoy his neighbor. The common law has always regarded the existence of malice in the exercise or pursuit of one's legal rights as of no consequence; just as its absence is of no consequence in the cases of injury caused by wrongful acts. The inquiry into and adjudication upon a man's motives have always been regarded as beyond the domain of civil jurisprudence, which resorts to presumptions of malice from a party's acts instead of inquiring into the real inner workings of his mind. When therefore we inquire how far a man was actuated by malice in erecting a structure upon his own land, we are inquiring after something that it will always be very difficult to ascertain, unless we adopt, as in other cases where the courts inquire after malice, a presumption of malice from the act done. And in this view of the matter we think no rule can be laid down that is on the whole more easy of application, and more likely to be correct in its application, than that the structure intended by the statute must be one which from its character, or location, or use, must strike an ordinary beholder as manifestly erected with a leading purpose to annoy the adjoining owner or occupant in his use of his premises. If the defendant has erected a house or block on his own land, so close to the dividing line between his lot and his neighbor's as to darken the side windows of his neighbor's house, no one would say that he had done a thing that was mainly intended to annoy his neighbor, and yet in his heart there may have been a malicious delight at the damage he was doing his neighbor. In such a case the obvious propriety of such an erection should determine the question in favor of the party making it, without putting him under oath as to his motives. In the same way, if a land owner should locate a privy or pig-sty directly on his line, and as close as possible to the near parlor windows of his neighbor, or should erect a rough screen of boards before his windows to darken them, the very character and location of the structures would strike every beholder as decisive evidence of an intent to annoy, and of this intent as an

entirely predominant one ; and a court might very properly so determine without leaving the case to rest on proof, generally the party's own oath, that there was no malice in the case.

Applying this rule to this case, it is very questionable whether any ordinary observer would not see in the structure here complained of, one which the defendants might reasonably erect, as a proper means of exhibiting their own goods, and a proper use of the space in front of their store, which was theirs for every reasonable and legitimate use, and therefore one of which the plaintiff has no right to complain, while the intent to annoy the occupant of the plaintiff's store, though found as a fact, and though without it the showcase might not have been procured, was really subordinate to the legitimate purpose. But whether or not an ordinary observer would have so regarded the structure, the court has here found as a fact, upon what evidence it does not appear, that the primary object of the defendants was the legitimate one of displaying their goods, and the intent to annoy the neighbor only a secondary one. And we think it therefore, considering all the circumstances, a case that falls within the line, which we do not attempt to define with exactness, that divides structures that the court will not interfere with from those against which the statute intended to furnish a protection.

There is a feature of this case that we ought perhaps to notice more particularly. The occupant of the plaintiff's store and the defendants were rivals in business. It was the right of each not only to show his own wares to the best advantage, but also to prevent the other from getting any advantage in the exhibition of his to which he was not legally entitled. While such competition in all business tends to benefit the public, there are yet many things done in it that are by no means commendable, and which often belong to a low level of morality; but which are yet beyond the control of law. The act of the defendants in this case was, at the worst, of that character. So far as it was intended to annoy the occupant of the plaintiff's store it was not so much from malice, as we ordinarily understand that term, and as we think it is to be understood in the statute, as from a spirit of competition in business — of ill will perhaps — yet not so much against the object of it as an individual as against him as a rival in business. We do not mean to say that such acts may not be carried so far as to fall within the condemnation of the statute, but we think that to do so they must

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as a general rule go quite beyond the petty hostilities of business competition.

A question was made by the defendants whether the action could be maintained by the plaintiff, as owner of the premises, while the acts complained of were directed wholly against his lessee, who was occupying the store, and whose business it was claimed, was injured by them. In the view we have taken of the case we have not thought it necessary to consider this question. We have treated the case as if the plaintiff had himself been the occupant.

There is no error in the judgment complained of.

No error.

In this opinion the other judges concurred.

CARD V. ALEXANDER.

(48 Conn. 402.)

Marriage — bequest by husband to wife — divorce.

A bequest by a husband in favor of his wife is not avoided by a subsequent divorce for her fault*.

SUIT for construction of a will. The opinion states the case. Case reserved.

J. Halsey, C. E. Searls, R. D. Hubbard, and G. W. Phillips, for defendant.

CARPENTER, J. This is an application for a judicial construction of the will of Luther D. Alexander. The second clause of the will, which is the one in question, reads as follows :—

“I give and bequeath to my wife, Amelia F. Alexander, the sum of four hundred dollars annually, to be paid her annually by my executor hereinafter named out of the income of my estate during her natural life ; said annual payment of four hundred dollars to be in lieu of and in full discharge of all rights, claims or demand of dower on my estate ; and if she shall refuse to accept the same in lieu of dower, then she shall have and be entitled to have only her right of dower in one-third of my real estate.”

* To same effect *Charlton v. Miller* (27 Ohio St. 296), 22 Am. Rep. 807.

The will bears date and was executed in March, 1873. In August, 1874, Luther D. Alexander was duly divorced from Amelia F. Alexander on his own petition, and died on the first day of March, 1879, leaving two children his heirs-at-law.

The question now presented for our consideration is, whether the second clause in the will was revoked by the divorce.

We think the bequest is absolute. The words "my wife" are descriptive of the person, and do not import a condition that if she survives him she shall remain his wife until his death. The words which follow do not change the meaning and have little force. They simply express the testator's will that she shall not have the legacy and dower, instead of leaving it to the implication of law to the same effect. That was more satisfactory to him, and was doubtless all that he intended.

It is a will we are considering and not a contract. A bequest requires no consideration to support it. Hence the suggestion that the relinquishment of dower was in the nature of a consideration for the bequest has no special force. It is true that by accepting the bequest she would thereby have relinquished her right of dower if she had had such right, and by electing to take dower she would have waived her right to the bequest; but that does not make the one, in a legal sense, a consideration for the other. Motives or reasons for doing an act are quite distinguishable from a legal consideration essential to the validity of an act.

The counsel for the heirs however insist that she must not only be willing but able to relinquish her right of dower; that is, that she must actually have such right at the time of her husband's death. No such condition is expressed in the will, and the words used do not imply one. They afford slight, if any evidence, that such a condition was in his mind. If he had intended it apt words to express such an intention would doubtless have been employed. In the absence of such words we must infer that he had no such intention.

But it is contended that the divorce by operation of law revoked this bequest. No case is cited in support of this position, and we are not aware that any exists. It may be true that the divorce divested the wife of all those executory property rights which had no basis but the coverture, but that hardly reaches this case, for here the right rests mainly not upon coverture but upon the will; and it cannot be said that coverture was the sole motive or inducement to the will.

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After that was taken away it still remained true that she had been his wife, and that she was the mother of his children. It is hardly credible that any man of ordinary sensibilities would desire to leave her destitute. Add to this the further facts, which exist in this case, that the testator was possessed of a large estate, that the provision made for the wife was a mere pittance, and that he lived nearly five years after the divorce, making no change in his will, and the conclusion is well nigh irresistible that he did not intend to deprive his former wife of the provision he had made for her. There is not therefore sufficient reason for presuming that the testator intended by procuring the divorce to revoke the legacy to her; and these considerations are cogent reasons why we should not hold, as matter of law, that the divorce revoked the legacy.

Moreover the analogies of the law, so far as there are any, are against it. The death of the wife during the life-time of the testator defeats the legacy, because it then lapses as in ordinary cases. The dissolution of a corporation legatee has the same effect. In these cases the objects of the testator's bounty cease to exist, before the will takes effect. In this case she survives and is capable of taking. A more analogous case is that of marriage; and it is now well established that marriage alone will not revoke a will previously made. In order to have that effect there must be coupled with it the birth of a child or children.

We think the second clause of the will is operative, and the Superior Court is so advised.

In this opinion the other judges concurred.

CITY OF HARTFORD V. TALCOTT.

(48 Conn. 525.)

Municipal corporation — negligence — remedy over against lot-owner.

A city lawfully enacted an ordinance requiring lot occupants to remove ice and snow from sidewalks, and imposing a penalty for neglect. By reason of such neglect a passer was injured and recovered against the city, and the city having paid the judgment, sued the lot occupant therefor. *Held* not maintainable.*

* To same effect *City of Keokuk v. Independent Dist. of Keokuk* (53 Iowa, 352), 36 Am. Rep. 236. Compare *Chesapeake, etc., Co. v. Comr's, post. Taylor v. Lake Shore, etc. R. Co., post.*

ACTION to recover amount of a judgment. The head-note and opinion show the facts. Case reserved.

C. E. Perkins, for plaintiff.

E. B. Bennett, for defendant.

PARDEE, J. The State places upon municipal corporations the burden of keeping the highways within their respective limits in a reasonably safe condition for public travel; and in cities and boroughs this duty is co-extensive with the width of the street, including that portion used by foot passengers exclusively. As both the carriage and foot-ways are for the convenience of the public and not for the especial use and benefit of adjoining proprietors under the general law, the money expended in maintaining, and making compensation for injuries resulting from neglect to maintain them, is to be paid by the public from taxes assessed equally upon all property. The ownership of land upon a way does not carry with it the burden of an unequal contribution to either branch of these expenditures. The individual owes no duty to the public in reference to the way except to remove therefrom all property of his own which obstructs it, and to refrain from doing or placing any thing thereon dangerous to the traveller. So far as defects in it result wholly from the operations of nature, the proprietor at whose front they exist is without responsibility for them. Therefore where ice has accumulated upon the sidewalk to a dangerous extent it is the duty of the municipality to remove or cover it within a reasonable time after its formation.

The charter authorizes the council to make an ordinance regulating the keeping "open and safe for public use and travel, and free from encroachment and obstruction, the streets, highways and pass-ways, and public grounds and places in said city." But there is in this language no grant of power to the council to change the general law and transfer the responsibility for injuries resulting from defects in the way from the public to an individual who is not responsible for their existence. The utmost reach of it is only to authorize the enactment of an ordinance requiring each proprietor upon the way to assist the city in restoring the walk to a condition of safety, with a fixed and reasonable penalty for disobedience.

The council enacted the following ordinance :—

"SEC. 11. The owner or owners, occupant or occupants, private

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corporation, or any person having the care of any building or lot of land bordering on any street, square or public place within the city, where there is a sidewalk graded, or graded and paved, shall cause to be removed therefrom any and all snow, sleet and ice, within two hours after the same shall have fallen, been deposited or found, or within three hours after sunrise, when the same shall have fallen in the night season.

"SEC. 12. Whenever the sidewalk or any part thereof adjoining or fronting any building or lot of land, or any street, square or public place, shall be covered with ice, it shall be the duty of the owner or owners, occupant or occupants, private corporation, or any person having the care of such building or lot, to cause such sidewalk to be made safe and convenient by removing the ice therefrom, or by covering the same with sand or some other suitable substance; and in case such owner or owners or other persons shall neglect so to do for the space of one hour during the day-time, the person or persons whose legal duty it shall be to so clear said walk and so neglecting, shall be liable to the penalty named in the succeeding section.

"SEC. 13. The owner or owners, occupant or occupants, private corporation, or any person having the care of any building or lot of land, and whose duty it is to clear the same, who shall violate any of the provisions of the eleventh or twelfth sections of this ordinance, or refuse or neglect to comply with the same, shall pay a penalty of two dollars for every twelve hours such person, owner or owners, occupant or occupants, shall neglect to comply with said provisions, or any of them, after notice from any policeman of said city.

"SEC. 17. If any sidewalk shall remain incumbered with snow, ice or sleet, for twenty-four hours, after the same has fallen or been deposited, the chief of police shall notify the owner or person having the charge or care of the lot or building bordering on such sidewalk and legally liable to clear the same; and if such sidewalk is not thoroughly cleared within twenty-four hours after such notice shall have been given, or properly covered with sand or some other suitable substance, the chief of police shall cause the same to be cleared, and collect the expense thereof of such owner or other persons, and the city attorney shall, at the request of the chief of police, collect by suit such expense as a debt due the city."

But by passing this ordinance the city has not relieved itself from

responsibility for the safety of travelers ; it remains answerable for injuries resulting either from the negligence of the individual or its own omission to act. The labor performed by those who obey and the fines and expenses paid by those who do not, measure the extent of the advantages to be derived from the exercise of the power to pass it.

Moreover there not being upon the individual any liability at common law for injuries resulting from obstructions in the way, wholly the effects of natural causes, such liability is not brought into existence by force of declarations in the ordinance that the obstructions are nuisances, or that it is his duty to remove them ; for as the liability is the creation of the ordinance, it can be no greater than that specifically named therein ; and as in the one before us the council measured it by a fine with cost of removal, the city has thereby barred itself from enforcing an unnamed and unlimited liability beyond. In the matter of statutory penalties the expression of a certainty prevents the existence of an uncertainty.

In support of his position counsel for the plaintiff has cited — *Robbins v. City of Chicago*, 4 Wall. 657 ; *Portland v. Richardson*, 54 Me. 46 ; *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick. 24 ; and *Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475 ; s. c., 7 Am. Rep. 469 ; but these are instances of excavations made and negligently left open in the way by the defendants ; *Boston v. Worthington*, 10 Gray, 496 ; *Churchill v. Holt*, 127 Mass. 165 ; s. c., 34 Am. Rep. 355 ; — instances of cellar-ways opening into the street and negligently left unprotected — practically, daily digging and leaving open a dangerous excavation in the street ; *Milford v. Holbrook*, 9 Allen, 17 ; — negligently permitting an awning to fall ; *Gray v. Boston Gas Light Co.*, 114 Mass. 149 ; s. c., 19 Am. Rep. 324 ; — negligently permitting a chimney to fall ; *Norwich v. Breed*, 30 Conn. 535, — digging and negligently leaving unprotected an excavation on the defendant's land, but so dangerously near and open to the street as to be in effect an excavation therein. In each case the defendant placed a dangerous obstruction in the way, and of course for a time after doing the act, was upon every principle responsible for the consequences, and that irrespective of any city ordinance.

The Court of Common Pleas is advised to render judgment for the defendants.

Judgment accordingly.

In this opinion the other judges concurred.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

STRAUCH V. HATHAWAY.

(101 Ill. 11.)

Deed — acknowledgment — evidence to impeach.

As against an innocent purchaser, the certificate of a married woman's acknowledgment of a deed may be impeached by proof that she did not acknowledge, but the evidence must be clear and conclusive, and exclude every reasonable doubt. A simple majority of witnesses will not answer.

ACTION to recover land. The opinion states the facts. The plaintiff had judgment below.

Hunter & Hunter, for appellants.

James Shaw, for appellees.

MULKEY, J. On the 26th of February, 1876, Edwin Hathaway borrowed of Caroline Marks \$3,000, to secure which he and his wife, Flora A. Hathaway, executed a deed of trust to Henry A. Miles as trustee, in the usual form, upon their homestead premises, which the proofs show do not exceed in value \$1,000. Default having been made in payment, the premises were sold under the trust deed, and George Strauch became the purchaser. Hathaway and wife having refused after demand to surrender possession of the

premises to Strauch, the latter instituted an action of forcible detainer to recover their possession, whereupon appellees filed the present bill against appellants in the Carroll county Circuit Court, by which they seek to set aside the sale under the trust deed, to enjoin the forcible detainer proceeding, and to have their homestead set off and assigned to them. The relief sought by the bill is asked on the alleged ground that the deed of trust contained no waiver of the homestead by Mrs. Hathaway. The Circuit Court found the equities with appellees and rendered a decree in conformity with the prayer of the bill, and appellants bring the record here for review.

It is admitted that the deed of trust was signed by the wife as well as the husband, and the certificate of the magistrate is in due form and shows a release and waiver of the homestead by them both. All the witnesses who claim to know any thing about the transaction testify to the fact that Mrs. Hathaway went with her husband to the premises of the justice at the time the acknowledgment was taken, and it is admitted that he acknowledged it; but it is claimed that the husband alone went into the house where the justice kept his office, leaving his wife in the carriage which had conveyed them there, in company with Mr. and Mrs. Holt, all four of whom testify to this fact. On the other hand, as has already been stated, the certificate of the magistrate shows a release and waiver of the homestead by them both. The magistrate also testifies to the taking of her acknowledgment at the same time he took the husband's, and that the same was taken at his office in his house. In addition to this, Mrs. Bell, who was present at the time spoken of by the other witnesses, testifies that Mrs. Hathaway was in the office of the justice at the time of the acknowledgment of the deed by her husband, though she does not pretend to remember the details of what occurred while there.

In view of the fact that more than four years elapsed between the taking of the testimony and the occurrences to which it relates, it is not at all surprising that there should be discrepancies in the recollection of witnesses as to what actually did occur—these differences in the recollection of persons of unquestioned integrity with respect to events which have transpired a number of years past, are but a part of the common experience of every one who notes the current events of life. This being so, it shows how much more reliable and trustworthy, as a muniment of title, is the solemn

official record of a fact made at the time of its occurrence than the mere recollection of witnesses, however honest, with respect to such fact, especially where years have passed since it transpired.

In the present case no apparent motive is shown for the execution of a false certificate, and there is nothing in the whole record tending to show any combination, fraud or conspiracy on the part of the justice or others connected with the transaction. Under such circumstances nothing but the most clear and satisfactory evidence would warrant us in declaring the certificate of the justice a forgery, and thereby defeating the title of the purchaser at the trustee's sale, who in good faith paid his money for the premises, relying upon the genuineness and truthfulness of the certificate. If landed titles could be set aside and defeated upon a mere conflict of verbal testimony like that presented in the present case, without any evidence tending to establish fraud or conspiracy, no one could know with any degree of assurance when he would be safe in buying a title of any kind, and the general confidence in titles of record would soon be destroyed.

Mr. Wharton, in discussing this subject in his work upon Evidence, says: "The true view is that a certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal between the parties by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the officer to certify, if he has jurisdiction." 2 Whart. on Ev., § 1052.

This court has not gone to the full extent of the latter proposition. While we hold the certificate shall not be deemed conclusive in any case so as to cut off all inquiry, yet where there is no evidence of fraud, conspiracy or overreaching of any kind, or any thing casting a suspicion upon the integrity or honesty of the certifying officer, and the certificate of acknowledgment is in conformity with the statute, it cannot be impeached by merely negating the facts therein stated. *Monroe v. Poorman*, 62 Ill. 523; *McPherson v. Sanborn*, 88 id. 150; *Russell v. Baptist Theological Union*, 73 id. 337.

Where the controversy is between the former owner and an innocent purchaser, as in the present case, before the title of the latter can be thus impeached the evidence should be clear and conclusive, excluding every reasonable doubt. The evidence in this case is not

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of that character. The utmost that can be claimed, even leaving the certificate itself out of the question, is that there is simply a preponderance of testimony in favor of appellees, in so far as numbers of witnesses go to make up preponderance, which is not always a safeguard in determining the weight of evidence. But under the circumstances of this case, we regard the certificate of the officer as entitled to more weight than all the witnesses put together.

The decree of the Circuit Court will be reversed and the bill dismissed.

Decree reversed.

WASHINGTON ICE COMPANY V. SHORTALL.

(101 Ill. 46.)

Water and water-courses — right of riparian owner to ice.

A riparian owner on a navigable stream above tide-water owns the ice formed in it opposite his land to the center.

SUFFICIENTLY reported, 38 Am. Rep. 255.

PEOPLE ex rel. v. BOARD OF EDUCATION.

(101 Ill. 308.)

Constitutional law — right of colored children in common schools.

Where the State has not authorized separate common schools for colored children, a city board of education has no right to establish them, and exclude such children from the other schools. (*See note, p. 303.*)

QUO WARRANTO. The opinion states the case. The defendant had judgment below.

John M. & John Mayo Palmer, for plaintiff in error

Wheat & Marcy, for defendants in error.

CRAIG, C. J. This was an information in the nature of a *quo warranto*, brought by the attorney-general, on the relation of

John Longress, against the board of education of the city of Quincy, a corporation created by an act of the general assembly, approved February 20, 1861, Private Laws of 1861, page 252. The board of education is intrusted by law with the exclusive management and control of the public schools in the city of Quincy.

It is alleged in the information, that the board of education did, to-wit, on the 31st day of July, 1878, divide the city of Quincy into eight districts suitable and convenient for the inhabitants of the city, and did establish and maintain in each of said districts an efficient and suitable public school, for the accommodation of all the *bona fide* residents of each of the districts between the ages of six and twenty-one years, and by proper rules providing that no pupil shall enter a school out of the district in which he or she resides, without permission of the superintendent, and that pupils, to be entitled to admission in any of the public schools, must be between the ages of six and twenty-one years, and *bona fide* residents of the city; and no pupil can be admitted into any public school without furnishing evidence to the principal that he or she has been vaccinated, or otherwise secured against the small-pox.

It is also averred in the information, that on the 31st day of July, 1878, before that time and since, there was a large number, to-wit, five hundred persons of African descent, commonly called "colored persons," between the ages of six and twenty-one years, who for all that time have been and are now *bona fide* residents of said city of Quincy, and in the several school districts thereof, and have been and are at all times, and are now, ready to furnish to the principal of the proper school satisfactory evidence that they have been vaccinated; and the said persons do now reside, and at all times heretofore have in good faith resided, in the different school districts of said city so established by the said the board of education of the city of Quincy, and are entitled to be admitted into the public schools of the districts in which they respectively reside, without being directly or indirectly excluded therefrom on account of their descent or color; yet the said the board of education of the city of Quincy, during all the time aforesaid, without warrant or authority of law, have adopted, maintained and enforced for the management of the public schools of said city, and to exclude the said persons of African descent, commonly called "colored persons," from the said public schools in the districts in which they reside. on account of their descent and color, the following pre-

tended rules and regulations for the government and management of the public schools of said city, that is to say: "That the colored schools of said city shall be composed of colored pupils who shall be of the prescribed age, and *bona fide* residents of said city; that no pupil of African descent shall be permitted to attend any of the public schools of the city other than the colored schools, and that all the colored pupils in said city shall attend a certain public school in said city, called the Lincoln school, and no other." All of which pretended rules and regulations for the government and management of said public schools in said city, the said the board of education of the said city of Quincy, without authority of law, do maintain and enforce, to the damage of the people of the State of Illinois, and against the peace and dignity of the same.

The board of education filed five pleas to the information, to which the attorney-general interposed a demurrer, which the court carried back and sustained to the information, and this decision of the court is assigned for error.

Whether a proceeding in the nature of a *quo warranto*, instituted by the attorney-general, will lie in a case of this character at common law, is a question which it will not be necessary to determine. The object of the proceeding was to test the legality of the rules adopted by the board of education, and if the statute is broad enough to authorize the court to inquire into the action of the board in adopting and enforcing the rules which excluded children of color from the public schools, then the information was proper, and the court erred in sustaining the demurrer.

Sec. 1, chap. 112, Rev. Stat. 1874, p. 787, provides, "that in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, * * * or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, * * * the attorney-general or State's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof, in vacation, for leave to file an information in the nature of a *quo warranto*, * * * and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition," etc.

The board of education is a corporation created by law,

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clothed with the exercise of certain powers in relation to the public schools of Quincy. Now, if the board, in the discharge of its duties as a corporation, exercises powers not conferred by law, it is apparent that it will fall within the obvious meaning of the statute, unless the plain reading of the statute is to be disregarded. The very gist of the complaint here is, that the board of education, a corporation, is exercising powers not conferred by law, unless it had the right to adopt and enforce the rules set out in the information. We are therefore clearly of the opinion, that under the statute the attorney-general had the right to file the information.

This brings us to a consideration of the rules adopted and enforced by the board.

The board of education of the city of Quincy can exercise such powers, and only such, as are conferred upon it by the Constitution and laws of the State. The inquiry then is, whether the rules adopted and enforced by the board, which exclude children of African descent from admission to the public schools which are provided for white children, are authorized by the laws of the State. It will not be necessary to determine what rights colored children had in our public schools prior to the adoption of our present Constitution, as this case must be controlled by the terms of that instrument and the legislation which has followed since its adoption and ratification by the people.

Sec. 1, of art. 8, of the Constitution of 1870, declares: "The general assembly shall provide a thorough and efficient system of free schools, whereby *all* children of this State may receive a good common-school education." In pursuance of this provision of the Constitution, which makes no distinction in regard to the race or color of the children of the State who are entitled to share in the benefits to be derived from our public schools, the legislature, in 1872, passed an act to establish and maintain a system of free schools. Laws of 1870, p. 700. Sec. 48, of the act provides that "the directors of each district shall be a body politic and corporate, under a certain name. They shall establish and keep in operation, for at least five months in each year, and longer if practicable, a sufficient number of free schools for the proper accommodation of all children in the district, and shall secure to all such children the right and opportunity to an equal education in such free schools."

This section of the act was doubtless framed and adopted in view of the constitutional provision heretofore cited, and shows the clear intent of the legislature to make all children, regardless of race or color, between the ages of six and twenty-one years, beneficiaries, and entitled to the same rights and privileges in our free schools.

It may be that under the terms of section 79 of the act, the section cited did not apply fully and in all respects to a city like Quincy, acting under a special act; but that fact we do not regard as material, in view of subsequent legislation on the same subject. In March, 1874, the legislature passed an act entitled "An act to protect colored children in their rights to attend public schools," the first section of which declares "that all directors of schools, boards of education, or other school officers whose duty it now is or may be hereafter to provide, in their respective jurisdictions, schools for the education of all children between the ages of six and twenty-one years, are prohibited from excluding, directly or indirectly, any such child from such school on account of the color of such child." This section of the statute is so plain, and its terms are so clear, that its purport cannot be misunderstood.

Under the amendment of the Constitution of the United States, persons of color are citizens of the United States and of the State where they may reside. Being citizens of the State, upon an equality with other citizens, there can be no doubt in regard to the power of the legislature to provide that no discrimination shall be made on account of color, by boards of education who have the management and control of our free schools. Has the board of education disregarded and violated this section of the statute? The answer to this, in our judgment, cannot admit of a reasonable doubt. It appears from the information, that the city of Quincy was divided into eight school districts — that colored children reside in each of them. Under the rules adopted, these colored children are excluded from the public schools in the district where they reside, and are all required to attend a school composed exclusively of colored children, known as the Lincoln school. Under the operation of these rules a colored child cannot attend the school in the district where such child resides, on account of its color, but is compelled to travel perhaps several miles to a distant part of the city to a colored school. This is a direct violation of the statute, which says the board is prohibited from excluding, directly or indirectly, any such child from such school on account of color. Under the rules no

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reason is assigned which prohibits a colored child from attending the school in the district where it resides, except on account of its color.

In *Chase v. Stephenson*, 71 Ill. 383, where a similar question arose, the court said: "While the directors very properly have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no powers to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position. The free schools of the State are public institutions, and in their management and control the law contemplates that they shall be so managed that all children within the district between the ages of six and twenty-one years, regardless of race or color, shall have equal and the same rights to participate in the benefits to be derived therefrom."

What was said in the case cited must be regarded as authority here.

Much of the argument on behalf of defendants in error has been directed to the point that the fourteenth amendment to the Constitution of the United States has no application to the questions presented by this record. Whether the fourteenth amendment would prohibit school directors or boards of education from excluding colored children from the public schools by the adoption and enforcement of such rules as have been adopted in this case, is a question which we do not deem it necessary to determine here. We base our decision on the Constitution and laws of the State. The people of the State have a right to make such a Constitution, and enact such laws under it, as they deem for the best interests of the public, and so long as our laws do not conflict with the Constitution of the United States they must be held valid and binding upon the people of the State. Under our law, aside from the fourteenth amendment, directors of schools and boards of education, like defendants in error, have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion.

A like view of the same question was taken in *Clark v. Board of Directors*, 24 Iowa, 266, where it said: "All the youth are equal before the law, and there is no discretion vested in the board of directors, or elsewhere, to interfere with or disturb that equality. The board of directors may exercise a uniform discretion, equally operative upon all, as to the residence, or qualifications, or freedom from contagious disease, or the like, of children, to entitle

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them to admission to each particular school; but the board cannot, in their discretion or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing, or the like."

The case of *State v. McCann*, 21 Ohio St. 198, cited and relied upon, can have no bearing here, for the reason that boards of education in that State were authorized by statute to establish separate schools for colored children. *Roberts v. City of Boston*, 5 Cush. 198, relied upon by defendants in error, is distinguishable from this case. In Massachusetts when the case was decided, there was no statute in the State prohibiting the school authorities from establishing colored schools and excluding colored pupils from the other schools. It is there said: "In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification, and when this power is reasonably exercised, without being abused or perverted by colorable pretenses, the decision of the committee must be deemed conclusive."

Ward v. Flood, 48 Cal. 36; s. c., 17 Am. Rep. 405, and *Cory v. Carter*, 48 Ind. 327; s. c., 17 Am. Rep. 738, were both cases where the statute of the respective States provided for the education of white and colored children in separate schools.

In *Hall v. DeCuir*, 5 Otto, 506, the question here presented was not before the court, and what was said by Mr. Justice CLIFFORD in a separate opinion, in relation to the bearing of the fourteenth amendment of the Constitution on the question here involved, cannot be regarded as authority here.

Whether our Constitution, and the acts of the legislature passed in pursuance of it, which place all children, regardless of color, upon a perfect equality so far as admission into the public schools is concerned, are to be regarded as wise or unwise legislation, is a matter with which courts have no concern. We are bound to declare the law as we find it written, and if it is not satisfactory to any section of the State, the remedy is in the legislative department of the government, and there alone.

In conclusion we are of opinion that the board of education of the city of Quincy had no authority to adopt and enforce the rules set out in the information, and the judgment will be reversed and the cause remanded.

WALKER, J., dissented.

Judgment reversed.

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NOTE BY THE REPORTER. — To the same effect is *Board of Education v. Tinnon*, 26 Kans. 1. VALENTINE, J., said : " The tendency of the present age is not to make any distinctions with regard to school children, except to classify them with reference to their studies and place them in the classes in which they properly belong. All kinds of children are usually allowed to go to the same schools, and all kinds of children are usually placed in the same classes. Boys and girls are allowed to go not only to the same schools, but are also placed in the same classes, and even colleges are now opening their doors for the education of both sexes ; and is it not better that this should be so ? Is it not better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other ? At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature ; there they may learn human nature in all its phases, with all its emotions, passions and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities ; there they may learn the secret springs of human actions, and the attractions and repulsions, which lead with irresistible force to particular lines of conduct. But on the other hand, persons by isolation may become strangers even in their own country ; and by being strangers, will be of but little benefit either to themselves or to society. As a rule people cannot afford to be ignorant of the society which surrounds them ; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.

" The Supreme Court of Iowa seems to have taken the same view of this subject that we have taken — that is that unless the legislature has *clearly* conferred power upon the school boards to establish separate schools for the education of white and colored children, no such power has been conferred. Under a statute which reads, ' in each sub-district there shall be taught one or more schools for education of youth between the ages of five and twenty-one years,' the Supreme Court of Iowa held that the school board could not establish separate schools for the education of white and colored children, and could not exclude colored children from attending schools established for the white children alone. Sec. 12, ch. 172, Laws of Iowa of 1862, as amended by section 3, ch. 143, Laws of Iowa of 1866 ; *Clark v. Board*, etc., 24 Iowa, 266 ; *Smith v. Directors*, etc., 40 Id. 518 ; *Dove v. Independent School District*, 41 Id. 689.

" Now we do not think that the legislature of Kansas has *clearly* conferred power upon the school boards of cities of the second class to establish separate schools for the education of white and colored children. We do not think that the legislature has even been silent upon the subject. But by the clearest implication, if not in express terms, it has prohibited the boards from establishing any such schools. Said sections 2 and 9 of the Laws of Kansas of 1876 provide for a system of free schools in cities of the second class, giving the board of education plenary power over them. The board can organize a system of graded schools, establish a high school, and exercise sole control over the schools and school property ; provided always (under § 2), that it ' maintains a system of free common schools,' ' free to all children residing in such city,' of proper ages. Now if only one school out of all the schools of a city of the second class is free for colored children to attend, is that maintaining *common* schools, *free to all the children of the city* ? In the case of *Railroad Co. v. Brown*, 17 Wall. 416, in which the Supreme Court of the United States construed an act of Congress granting certain privileges to a railroad company, and also enacting that ' no person shall be excluded from the cars on account of color,' the court ' held, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars ; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively for white persons, and in fact the very cars which were, at certain times, assigned exclusively to white persons.' That is under this decision, railroad cars are not *free* to a person who is excluded from all but one of them ; and on the same principle, schools are not *free* to a person who is excluded from all but one of them.

" We suppose that the board of education of a city of the second class may grade the schools in such city, and then require that all children be placed in their proper grades. This is for the interest of education ; and the statute expressly authorizes it. We also suppose that the board of education may divide the city territorially into districts, build-

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ing school-houses in each district, and may then require that children shall attend school only in their own district. This would also be in the interest of education. Generally such a thing would be founded upon convenience, and sometimes upon necessity. But the power to divide a city territorially into districts does not include or prove the power to divide the city according to race, color, nationality or descent. In the case of *School District v. Aldrich*, 18 N. H. 139, it is held that 'a division of a town into school districts must be a territorial division, and not one merely by a designation of the inhabitants or householders.' And what good reason can exist for separating two children, living in the same house, equally intelligent, and equally advanced in their studies, and sending one, because he or she is black, to a school-house in a remote part of the city, past several school-houses nearer his or her home, while the other child is permitted, because he or she is white, to go to a school within the distance of a block? No good reason can be given for such a thing, and the legislature has not authorized or attempted to authorize it to be done. It has been suggested that the board of education may establish separate schools for males and females; and therefore that it may establish separate schools for white and colored children. Now the premise is not admitted, and the conclusion is a *non sequitur*. It is not admitted that the legislature has the power to authorize the board to establish separate schools for males and females (Const., art. 2, § 23); nor is it admitted that the legislature has ever attempted to do so; and besides even if the legislature had the power to authorize schools for males and females, and had attempted to exercise it, still it would not even then follow that the board of education could establish separate schools for white and colored children. There are greater differences existing between males and females of the same race and occupying the same condition in life, except as to sex, than there are between any two males, or any two females of different races, who reside in Kansas, and whose conditions are substantially equal, except as to race. This is recognised by the fact that male citizens of all races are allowed to vote, while no female citizen of any race is allowed to vote. There are physiological differences, and differences in wants and needs, and modes of life, existing between males and females of the same race, which do not exist between males of different races, or females of different races. Hence the power to establish separate schools for males and females, even if it were admitted, would not either include or prove the power to establish separate schools for children of different races; and especially it would not include or prove the power to establish separate schools for children of African descent. If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes. We do not think that the board has any such power. We have conceded, for the purposes of this case, that the legislature has the authority to confer such power upon school boards; but in our opinion the legislature has not exercised or attempted to exercise any such authority.

"The decision is not in conflict with any decision that we are aware of; but it is supported by the decisions in Iowa. The decisions referred to by the counsel for plaintiffs in error, defendants below, are either all very old and rendered before the war, or are founded upon statutes expressly authorizing separate schools for white and colored children; while in this State, our statutes have been recently enacted, and as we construe them they do not authorize the establishment of any such separate schools; and hence the decisions referred to by counsel have no application to this case. It must be remembered that unless some statute can be found authorizing the establishment of separate schools for colored children, no such authority exists; and we have been unable to find any such statute, and none has been pointed out to us." BREWER, J., dissented.

In *U. S. v. Bunton*, United States Circuit Court, Ohio, February 1882, it was held that the legislature may lawfully appropriate separate schools for the education of white children and children of negroes, and where a colored school is thus set apart, and is reasonably accessible to the negro children, and properly appointed with teachers, it is the duty of a negro child to attend such school, and he has no right to attend a school set apart for white children.

DULANEY V. PAYNE.

(101 Ill. 325.)

Judgment — bar — splitting causes of action.

A note being payable in one year, with interest semi-annually, and a suit being brought two years afterward to recover the interest then due, a judgment therein will be no bar to a subsequent action for the principal.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

Golden and Wilkin, for appellant.

O. B. Ficklin and Jas. A. Eads, for appellees.

CRAIG, C. J. This was an action of assumpsit, brought by Robert L. Dulaney, against Alex. M. Payne, Ed. Harlan, W. T. Martin, Lyman Booth and Dennis Legare, on a promissory note, executed by the defendants, which read as follows :

“\$4,262.55. Twelve months after date we, or either of us, promise to pay R. L. Dulaney, or order, the sum of four thousand two hundred and sixty-two and fifty-five hundredths dollars, with ten per cent interest from date, interest payable semi-annually, for value received, this 5th day of April, 1877.”

The defendants interposed 'a plea of former recovery, and the only question presented by the record is, whether the judgment read in evidence on the trial of this issue constitutes a bar to a recovery on the note. If it does, the decision of the Appellate Court affirming the judgment of the Circuit Court was right, and will have to be affirmed. If it does not constitute a bar, then the judgment of the Appellate Court will have to be reversed.

It appears, from the evidence, that all of the parties to the note, except Martin, on the 3d day of April, 1879, in due form executed a power of attorney authorizing and empowering Thomas G. Golden to confess a judgment at the next term of the Clark county Circuit Court, in favor of Dulaney, for the amount of the interest due upon the promissory note. Martin, having refused to join in the power of attorney, was brought into court by summons, and a declaration having been filed at the April term, 1879, of the court, judgment

by default was rendered against Martin, and by confession against the other parties to the note, for the sum of \$869.50, and costs.

There is a slight discrepancy between the judgment and amount of interest due on the note at the time the judgment was rendered, but from the evidence introduced it is apparent that the judgment was for no part of the principal debt, but merely for the interest then due upon the note, and whether the judgment was a little more or less than the real amount of interest, can not have any material bearing on the case. The law is well settled that a party can not divide an entire demand or cause of action, and maintain several suits for its recovery. It is also clear that a recovery for a part of an entire demand will bar an action for the remainder, if due at the time the first action was commenced. *Nickerson v. Rockwell*, 90 Ill. 460, and cases there cited.

The question then arises whether the principal of the note, and the interest accruing thereon semi-annually, is, within the meaning of the law, an entire demand. If it was, the plaintiff was bound, when he brought suit for the interest, to include the principal sum due on the note in the action. If it was not, then he had the right to sue for and recover the interest, and afterward recover a judgment for the principal. As is said in *Phillips v. Berick*, 6 Johns. 136; 8 Am. Dec. 299: "It is in the election of the plaintiff, if he has distinct causes of action, to sue upon all or any of them when he pleases, and he has the further election to unite one suit, under certain restrictions not now necessary to be stated, several causes of action; but the defendant can not compel him to do this."

What constitutes an entire or single demand is often a question of much difficulty, and the decisions of different courts are not in harmony on the question. Where a note is given payable in two or more years, with interest annually, at a specified rate per cent, the holder of the note may, at the end of the year, sue and recover the interest. *Walker v. Kimball*, 22 Ill. 537; *Goodwin v. Goodwin*, 65 id. 497.

The principle, doubtless, which led to this doctrine was, that the promise to pay interest, although connected in the same contract with a promise to pay the principal debt, constituted a separate and distinct cause of action. If this be so, it would seem to follow that a note like the one in question contains two contracts,—one to pay the principal, and the other the interest,—although each originally

grew out of one and the same transaction. In the discussion of this question, Freeman on Judgments, § 238, says: "A note payable in one year, with interest payable semi-annually, comprises two distinct contracts,—one to pay the principal sum, and the other to pay the interest. A judgment after the principal is due, in an action for interest, does not merge both contracts." If the author is correct in his position, the judgment recovered for the interest in this case would be no bar to this action brought to recover the principal. In support of the text the author cites, in a note, two cases, *Andover Savings Bank v. Adams*, 1 Allen, 28, and *Sparhawk v. Wills*, 6 Gray, 163, which fully sustain the doctrine announced. In the case of *Sparhawk v. Wills*, the question was whether a judgment for one year's interest on a note for \$4,000, payable in one year, with interest annually, was a bar to a recovery of the principal, and the court held that it was not. In deciding the case the court said: "The contract thus assumes a very simple form: 'I promise to pay the debt in one year; but if I do not, I will pay the interest at that time, and so at the end of each and every year until the debt is paid. Being a promise to pay the debt at one time, and contingently to pay the interest at another or some other times, it must be construed as containing distinct promises, giving several causes of action, and these being several in their origin, no subsequent event can make them one and entire.'" The case of *Andover Savings Bank v. Adams*, is to the same effect. It is there said: "The promises to pay the debt at one time, and the interest at another, are several, and afford several and distinct causes of action." These two cases are directly in point, the question presented and decided being the same as is involved in the case under consideration.

In 2 Pars. on Cont. 636, a contrary doctrine is announced. The author says: "One holding a note on which interest is payable annually or semi-annually, may sue for each installment of interest as it becomes payable, although the note is not yet due; but after the principal becomes due the unpaid installments of interest become merged in the principal, and must therefore be sued for with the principal, if at all." In support of the rule announced, the author in the note cites *Howe v. Bradley*, 19 Me. 31. In the case cited it was held that annual interest can not be recovered by a separate action after the principal has become due. This decision was made by a divided court, and although it may

sustain the rule laid down by Parsons, we are not inclined to follow it, believing as we do that the rules established by the courts in Massachusetts is the better doctrine, and more calculated to further the ends of justice. If an action may be maintained to recover annual interest before the principal sum becomes due, as this court has in a number of cases held it may, no good reason is perceived which will preclude a recovery of the interest after the maturity of the principal debt as well as before. *Secor v. Sturgis*, 16 N. Y. 548, has been cited as an authority bearing on the question. It is there said: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is that the former arise out of one and the same act or contract, and the latter out of different acts or contracts."

While we fully recognize the ability and learning of the court which declared the doctrine in the case cited, we can not sanction the rule declared. Several promissory notes may, and often do, grow out of one and the same transaction, and yet they do not constitute an entire demand. On the contrary, the holder may maintain separate actions for the recovery of each. For instance, A. may loan B. \$6,000 and as evidence of the debt take three promissory notes of \$2,000 each. Now, while the notes all grow out of one transaction and one contract, they are several, and a separate action may be brought upon each one of them. The fact therefore that the two agreements in the note in question, one to pay the interest at a specified time, and the other to pay the principal, grew out of one and the same contract, does not establish that the demand is single and entire.

Several decisions of this court have been cited by appellees as authority to sustain their position. Upon an examination however we do not find any of them in point. In the most of the cases cited the questions before the court involved a construction of sec. 49, chap. 79, Rev. Stat. of 1874, which requires all demands which do not exceed \$200 to be consolidated in actions before justices of the peace. What may have been said in such cases can have no bearing here. The note upon which this action was brought provided that the interest should be paid semi-annually, while the principal debt became due in one year from the date thereof. It is but reasonable to presume, from the nature of the transaction, that it was contemplated by the parties, although the note was by its terms due in one year, that it should run for a longer term, but

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that the interest should be paid every six months. Under such circumstances it would be manifestly unjust to hold that a judgment for the interest after the maturity of the note would bar a recovery of the principal, and we are unable to sanction authorities which establish such a rule. If a separate action may be maintained upon each one of several notes which grow out of a single contract, upon the same principle and for the same reason a note containing a promise to pay interest at one time and the principal debt at another, may be the foundation of one action to recover the interest, and another to recover the principal.

The judgment of the Appellate Court will be reversed, and the cause remanded.

Judgment reversed.

SCHOLFIELD, J., took no part.

FIRST NATIONAL BANK OF FLORA V. BURKETT.

(101 Ill. 391.)

Statute — construction — “malice”.

The defendant shipped hogs, taking a bill of lading, got a discount of his draft on the consignee with the bill of lading as collateral security, and afterward, and before the presentation of the draft, collected pay for the hogs from the consignee. The lender recovered judgment against him on an allegation of fraud, and he was imprisoned under it. *Held*, that “malice” was the “gist of the action,” within the meaning of the statute of civil imprisonment.

PETITION for discharge from imprisonment. The opinion states the case. The defendant was discharged below.

Rufus Cope, for appellant.

WALKER, J. It appears that appellee shipped by rail to Cincinnati, Ohio, sixty-five head of hogs. He consigned them to Green, Huddleson & Co. for sale, taking a bill of lading from the railroad company. He applied to the First National Bank of Flora for a loan of \$400. He drew a sight draft for that sum on Green, Huddleson & Co., and pledged the bill of lading, subject to charges, for its payment, and attached it to the draft. The hogs were received and sold, realizing \$425, but before the draft was presented, appellee collected that and all other money he had in the hands of

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that firm. When the draft was presented for the want of funds in the hands of the drawees it was protested for non-payment. The bank thereupon brought case, and on trial recovered a judgment against appellee for the sum of \$401.38, which has not been paid or satisfied. Fraud was averred in the declaration as the ground of action.

Afterward, the judgment remaining unpaid, plaintiff sued out a *capias ad satisfaciendum*, and under it defendant was imprisoned. He thereupon filed a petition to the County Court for a discharge, on the ground that he was illegally committed. The bank answered, setting out the proceedings in full in the suit in which it had recovered the judgment, but the County Court sustained a demurrer to the answer, and discharged defendant. The bank appealed to the Circuit Court, where the judgment was affirmed. The bank thereupon appealed to the Appellate Court for the Fourth District, where the judgment of the Circuit Court was affirmed, and the case is brought to this court on a certificate that the case involves a question of law which is required to be passed on by this court.

The assignment of errors questions the correctness of the construction given by the Appellate Court to the second section of chapter 72, in relation to insolvent debtors. It provides, that "when any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action wherein malice is not the *gist* of the action, or when any debtor is surrendered or committed to custody by his bail in any such action, or is arrested or imprisoned upon execution in any such action, such person may be released from such arrest or imprisonment by complying with the provisions of this act." No question as to such compliance is raised on this record, it being contended that under the facts disclosed appellee was not entitled to a release, — that the *gist* of the action in which judgment was recovered was malice.

This court had occasion, in the case of *People v. Greer*, 43 Ill. 213, to give a construction to this clause of the section. It was there said, that the intention was to release all persons confined on civil process, by their compliance with the requirements of the statute, although the cause was founded in tort, unless the tort was malicious, or what amounts to the same thing, where the tort originated in malice or where malice was the *gist* of the action. What then is malice?

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In the case of *Harpham v. Whitney*, 77 Ill. 32, the case of *Mitchell v. Jenkins*, 5 B. & Ad. 594, was referred to as defining malice. It was there said by PARKE, J., "that the term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." That definition was applied in a case of malicious prosecution. The term has been defined: "A formed design of doing mischief to another,"—"a wicked intention to do an injury to another." Thus, the forsaking of a husband or wife of the other, without sufficient cause, is said to be a malicious abandonment. Malicious mischief is the wanton or reckless destruction of or injury to property. It in some cases implies a wrong inflicted on another with an evil intent or purpose, and this is the sense in which it is employed in this statute. It requires the intentional perpetration of an injury or wrong on another. The wrong and intention to commit the injury are necessary to deprive the party of the right to a discharge from arrest or imprisonment. In this case there was an intentional wrong, little if any thing short of a criminal act, and it was malicious, in the statutory sense.

Being malicious, was it the *gist* of the action? The *gist* is defined to be the cause for which an action will lie,—the ground or foundation of a suit, without which it would not be maintainable,—the essential ground or object of a suit, and without which there is not a cause of action. In this case an action on the case could not have been maintained had not the defendant wrongfully and dishonestly drawn the money for which the hogs were sold, and for which he had given a draft to the bank on Green, Huddleson & Co., and for which draft the bank paid him. This fraud was of the essence or foundation of the action, and in the statutory sense it was both wicked and malicious.

We are therefore of opinion that the County Court erred in discharging appellee from the arrest and imprisonment, and it was error in the Circuit and Appellate Courts to affirm the judgment, and the judgment of the latter court must be reversed, and the cause remanded.

Judgment reversed.

SCOTT, J., dissented.

BYARS V. SPENCER.

(101 Ill. 429.)

Deed — delivery.

A father executed and acknowledged a deed to his two minor sons, but retained it through his life-time, and refused to record it, because recording it would put the title beyond his power, and subsequently declared his intention to sell the land if he could get a certain price, and offered it at that price. *Held*, invalid for want of delivery. (*See note*, p. 217.)

BILL to set aside partition. The opinion states the facts. The plaintiff had judgment below.

Barr & Lemma, and *G. W. Smith*, for plaintiffs in error.

Andrew D. Duff, for defendants in error.

WALKER, J. It appears that one Thomas Whitson, of Jackson county, in this State, was, in his life-time, the owner of one hundred and seventy-four acres of land, situated in that county; that the land was improved, and he resided on the same many years before his death. He was twice married, and was the father of eleven children, nine by the first and two by the latter wife. He survived both, and the children by the first wife, being grown, had left him, and remained on the farm with complainants, the two children by the latter wife. They were minors, the one eight and the other ten years of age. He made, executed and acknowledged a deed conveying this land to them. The deed was made in July, 1864, but was never delivered to the grantees, or to any person for them, nor was it recorded, nor did it ever pass out of the possession of the grantor or from under his control. At the time he made it he took it, after acknowledging it, to his house, and placed it in a drawer of a bureau with other papers, where it remained till the time of his death. He went to Worthen, a justice of the peace of Jackson county, and said to him he wished to convey these lands to his two minor daughters. He said to Worthen: "You know that I have given to my children by a former wife, that are grown and have left me, a good farm. These little ones have yet to be raised. I think it nothing but right that they should be provided for, mak-

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ing it equal with the others." The deed was made and acknowledged at the time this conversation occurred.

Subsequently, Worthen, in a conversation with Whitson, suggested to him that he should have the deed delivered and recorded. Whitson replied, that he, being the natural guardian,—the father of the children,—was the proper person to hold it; and with regard to recording it, he had an objection to its being recorded at that time, because if he could sell the land for \$6,000 he would divide the proceeds between the two children, but if the deed was on record he could not sell it, because of the deed being recorded; nor could the girls sell it, because they were minors. If the deed remained there unrecorded at his death, it would show his intention,—what he would do,—and right would be done. Whitson said, in conversation with Worthen's wife, that in value more was given to these two children than to the others; but he considered the matter in the light of the fact that the older children were raised, and "doing for themselves," but these two were to be raised, and added, he did not expect to live to raise them. He but a short time before his death offered to sell the land, and on several occasions called it his. Letters of administration were granted to Benj. B. Whitson, who took possession of the personal effects of deceased, and closed up and settled the affairs of the estate. Complainants charge that the administrator obtained possession of the deed, and destroyed or suppressed it, and there is some evidence that the deed came to his hands after the death of his father; but he denies it in his sworn answer and deposition, and denies ever having seen it, or of having any knowledge that it ever existed.

Izir Byars, one of the sons-in-law of Thomas, after the death of the latter, purchased of a number of the heirs their claims to or interest in the property, representing nearly one-half. He thereupon filed a bill against the heirs who had not sold, for a partition. On the hearing the court appointed commissioners to make partition, but they reported that the land was not susceptible of division without manifest injury to the parties in interest. The court approved the report, and thereupon decreed the sale of the land, and decreed that the master in chancery make the sale, after specified notice, etc. The sale was made to the Mount Carbon Coal and Railroad Company, now the Grand Tower Mining, Manufacturing and Transportation Company, for the sum of \$7,852.95, which was distributed and paid to the several parties to the bill, according to

their interests as found by the court, the complainants receiving their share, under the order of the court.

In the view we take of the case these are the material facts. Other facts are averred, and evidence was heard on them, but we regard them immaterial to the decision of the case. The bill prayed that the title of complainants might be established and confirmed; that the proceedings for partition might be set aside as void, and that all deeds from the heirs to Izir Byars be held and declared void as to them. On a hearing the Circuit Court decreed the relief asked, and the defendants below bring the record to this court on error, and urge a reversal.

The first question we propose to consider is, whether the deed executed by Thomas Whitson ever became operative to pass the title to the grantees named in the deed — whether there was such a delivery as passed the title to the land from him to them. It is conceded that to have that effect there must have been a delivery. On the one side it is claimed there was, and on the other it is insisted there was no delivery. The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative, and to pass the title to the land, has been the subject of much discussion in this court. It is held that a delivery is essential to render a deed operative, and it does not take effect until it is delivered. *Skinner v. Baker*, 79 Ill. 496; *Blake v. Fash*, 44 id. 302. It may be delivered to the grantee or to his agent. Nor is any particular form or ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee, that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor loses all control over it. *Bryan v. Wash*, 2 Gilm. 557. It has been held that where a deed is executed and delivered to even a stranger, to be delivered to the grantee, without conditions, it will be a sufficient delivery to pass the title. *Rawson v. Fox*, 65 Ill. 200. But the execution of a deed, and having it placed on record, without the knowledge of the grantee, is not a delivery. *Kingsbury v. Burnside*, 58 Ill. 310; *Krebaum v. Cordell*, 63 id. 23. But in such a case the subsequent assent of the grantee will be sufficient. *Dale v. Lincoln*, 62 Ill. 22.

In *Gunnell v. Cockerill*, 79 Ill. 79, it was held that any act which clearly manifests an intention of the grantor, and the per-

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son to whom it is delivered that the deed shall presently take effect and become operative, and the grantor loses all control over it, is a sufficient delivery. In all cases the intention of the grantor to part with its possession and control enters largely into the question of delivery. When the facts show that the grantor did not intend to lose control of the deed, and still continues to have power over the title without the consent of the grantee, there is not such a delivery as the law requires to render it a deed, and it cannot pass title. In this case Thomas Whitson, so far from manifesting such an intention, on the contrary retained the deed, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power to control it. He also expressed the intention, after he had made and acknowledged it, to sell the land, if he could do so, at \$6,000, and in pursuance of that intention he did offer to sell it. Instead of his doing or saying any thing indicating an intention to deliver the deed, his declarations and acts clearly prove that he did not intend to deliver the deed, or place the title in the grantees. Under none of the cases referred to can it be held there was a delivery, but they all hold there could not, under the facts of this case, have been a delivery, and there being no delivery, the complainants took no title under the deed.

It is however insisted by defendants in error that the case of *Dale v. Lincoln*, *supra*, is in fact and principle so nearly like this that it requires an affirmation. There is a broad distinction between that and this case. There the grantor had the deed recorded, and all of his acts showed he intended the title to pass to the grantee; nor did he do or say any thing that showed an intention to retain any control over it while he was in the army. Again, it was a delivery in *escrow*, and he directed that it should take effect on his death, if he should die in the army. The grantee having sold the land after the death of the grantor in the army, it was by a majority of the court held there was a sufficient delivery to pass the title, in equity, the grantee being his wife. Here the deed was not recorded, and was not, for the express purpose of retaining the power to control it by the grantor.

The case of *Reed v. Douthit*, 62 Ill. 348, is referred to as announcing rules that govern this case. In that case a father signed, sealed and acknowledged a deed to his minor son, saying he intended it as a provision for the son. He spoke of the land as his son's, who rented a portion of the land in the life-time of the

father, and exercised other acts of ownership over the land, and had the deed recorded after the death of his father, and had possession of the deed, and this was held to be evidence of the delivery of the deed, and cast the *onus* of proving a want of delivery on the parties questioning the grantee's title. There was no direct proof of a delivery of the deed, but the grantee had possession of it after his father's death. Those claiming to be tenants in common insisted that he was required to prove a delivery by specific evidence, but it was held that a delivery would be presumed under the circumstances appearing in evidence. But in this case there is evidence that the deed was not delivered, nor was it intended to be delivered. This fact clearly distinguishes this from that case.

Defendants in error refer to *Stinson v. Anderson*, 96 Ill. 373. In that case the father made and acknowledged a deed to his three minor children, and left it with the justice of the peace before whom it was acknowledged, requesting him to keep it for the grantor, saying, if he wanted it he would call for it, but if he died that he deliver it to the grantees. The grantor afterward mortgaged the same land to a third party, and it was held there was not a delivery to pass the title. There, as here, the grantor retained control over the deed, and it was held there was no delivery, and no title passed. In this case it clearly appears that it was the intention of Thomas Whitson to provide for these minor children by giving them this land, or its proceeds, but he failed to do so by omitting the observance of essential requirements of the law to effectuate the purpose. He seemed to rely on the sense of justice of his children by his first wife, and their supposed respect for his wishes, to fulfill and carry them into effect. He said to Worthen, if the deed remained there unrecorded at his death, it would show his intention as to what he would do, and right would be done. But he misplaced his confidence, as his children by the former marriage have failed to carry out his manifest intention. His intention is clear, but he failed to execute it. Complainants therefore took nothing under this deed, but simply by his death inherit in common with the other heirs.

[Minor consideration omitted.]

The decree of the court below is reversed, and the cause remanded.

Decree reversed.

MULKEY, J., took no part.

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NOTE BY THE REPORTER.—See *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 367; a. c., 35 Am. Rep. 166; *Campbell v. Kuhn*, post. In *Parker v. Parker*, 55 Iowa, 111, a grantor, intending to defraud his creditors, deeded to another, who executed a deed back to the grantor's wife, and delivered it to the husband. The husband did not deliver it, and the wife did not know of its execution, but it came into her possession some months afterward. Held a valid delivery.

The authorities are reviewed in the recent case of *Jones v. Swayze*, 42 N. J. 279, as follows:

"The leading case is *Garnons v. Knight*, 5 B. & C. 671, in which after a full discussion of the authorities, the court held that delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

"In *Zenno v. Wickham*, 106 E. C. L. Rep. 381, reviewed in the Exchequer Chamber (108 E. C. L. Rep. 435), and ultimately decided in the House of Lords (108 E. C. L. Rep. 861), it appears that the circumstances which go to make out a delivery are to be treated as indications of intention, and that the fact of delivery resolves itself into a question of intention. Mr. Justice BLACKBURN said that 'as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying, 'I deliver this as my deed,' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though of course if he has not previously assented to the making of the deed, the obligee may refuse it.'

"In *Garnons v. Knight*, Justice BAYLEY said: 'There could be no question but that delivery to a third person for the use of the party in whose favor the deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery; the law will presume, if nothing appears to the contrary, that a man accepts what is for his benefit.'

"That such is the presumption in the English law, until it is rebutted by proof of refusal to accept, will be found by an examination of the authorities referred to in the cases cited.

"In this country there is some diversity of view upon the question whether delivery takes effect until an actual acceptance by the grantee.

"In *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82, Chief Justice SAVAGE, after reviewing the earlier New York cases, said that if the delivery to the third person be absolute, the grantor not reserving any future control over the deed, the estate passes; the assent of the grantee to accept the conveyance being presumed from the fact that it is beneficial to him. The same rule is recognized in *Ernst v. Reed*, 49 Barb. 367, and in *Brown v. Austen*, 35 Id. 343, where the English cases are cited with approbation.

"In 2 Washb. on Real Prop. 681, the author says that 'the better opinion seems to be that no deed can take effect as having been *bona fide* delivered until such act of delivery has been assented to by the grantee.'

"An examination of the cases cited will show that most of them do not support the text.

"In *Maynard v. Maynard*, 10 Mass. 458; 6 Am. Dec. 146, the facts testified to show that the grantor intended to keep control over the deed until he was more determined on the subject, and that case was put upon the ground that he retained authority over it.

"In *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Am. Dec. 100, the grantor executed the deed, and was to retain it until the consideration money was paid.

"In *Stephens v. Buffalo and New York R. R.*, 30 Barb. 332, it was rightly held that there was no delivery without an acceptance by the grantee, for in that case it appeared that the instrument was placed in the hands of a third person to be offered to the grantee, and he did not accept it.

"Justice FIELD, in *Younge v. Guilbeau*, 3 Wall. 636, said, 'that to constitute delivery of a deed the grantor must, as a general thing, part with the possession of it, or at least with the right to retain possession. Upon a question of delivery, its registry, if by him, is

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entitled to great consideration, and might, perhaps, in the absence of opposing evidence, justify a presumption of delivery.'

"The law is clearly stated by Chief Justice Gissow in *Hannah v. Swarner*, 8 Watta, 11, where he says that 'the rule to be extracted from the authorities is, that a delivery to a third person for the present use of the grantee makes the instrument a present deed; but that a delivery to his use when he shall perform a condition makes not a present deed, and the grant may be frustrated by his refusal to perform it; and that a bare delivery to a stranger, without words of direction to deliver over to the grantee either absolutely or conditionally, is merely void.'"

FIFTH NATIONAL BANK V. VILLAGE OF HYDE PARK.

(101 Ill. 505.)

Bank — deposit in trust — notice.

A village treasurer borrowed money of a bank on his own note, with his own securities as collateral, professing to make the loan for the village, and to anticipate the collection of taxes, and the money was deposited in the bank to his credit as treasurer. Most of the fund was paid out upon the village warrants, and the treasurer, after the tax money came in, drew his check upon the fund to pay the note and redeem the collaterals. *Held* valid as against the village, although the treasurer proved a defaulter.

SUIT to hold defendant as trustee. The head-note and opinion state the case sufficiently. The plaintiff had judgment below.

Lyman Trumbull, Charles Hitchcock, and Melville W. Fuller, for appellant.

Leaming & Thompson, Charles H. Wood, and L. D. Condee, for appellee.

DICKEY, J. It is conceded that no one had the slightest suspicion that Waldron was a defaulter until some time in 1878, and about the first of May of that year. There is nothing in the proofs tending to show that any of the officers of the bank had any suspicion that Waldron was or had at any time been applying the moneys of the village to the payment of any claim or demand which (as between him and the village) he was in duty bound to pay from his own personal funds.

It is insisted by counsel for the village of Hyde Park that the several loans made of this bank by Waldron in his own name and

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upon his own notes, or the notes of other private persons, were mere private debts and not debts for which the village was liable, and inasmuch as the bank officers knew that the payment of these loans was made from funds known by them to be the funds of the village, they insist that such payment was known to them to be a misappropriation of the trust funds. The learned judge of the Circuit Court took this view of the matter in so far as concerns payments made after the account was kept in the name of "A. D. Waldron, Treasurer." He held otherwise, however, so far as regards payments made out of the account kept in the name of "A. D. Waldron." In *Morse on Banks and Banking*, 37, it is said in general terms: "If a depositor seeks to pay his own debt to the banker by an appropriation of the funds to his credit in a fiduciary capacity, then the banker is affected with knowledge of the unlawful character of the appropriation and will be compelled to refund." It seems plain however that unless the debt to which the funds are thus applied be such that the officers of the bank are aware that the same is really and in truth "his own debt," knowledge of the unlawful character of the appropriation cannot be imputed to the bank.

To charge a stranger to a trust fund as a trustee, by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt to the payment of which it was applied was at the time of such application in fact a private debt — a debt of such character that the fund in question could not lawfully be applied in payment thereof.

In *Keane v. Robarts*, 4 Madd. 357, it is well stated as the result of the authorities at that time (1819), that "every person who acquires personal assets by a breach of trust * * * is responsible to those who are entitled to the fund, if he is a party to the breach of trust." And again: "Generally speaking he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time but in satisfaction of his private debt, because this sale or pledge is *prima facie* inconsistent with the duty of an executor." This implies that the debt in satisfaction of which the property is taken is of such character that it is known to be a private debt, for

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it is elsewhere declared that the party so receiving the trust fund must, to become chargeable, have been guilty of "fraud, collusion or gross negligence." In the same case the vice-chancellor says: "If a party dealing with an executor for the personal assets pays his money to the executor so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it; but if in dealing with the executor he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor or to the private trade of the executor, and this because he knows that the object to which the money is applied is not an object to which it may be lawfully applied."

In *Field v. Schieffelin*, 7 Johns. Ch. 150; 11 Am. Dec. 441, Chancellor KENT says, in substance, that to charge a third party with participation in the misapplication of trust funds by a trustee, the proof must "justify the conclusion of a breach of trust, in which the party to be charged knowingly partook." That was the case of a guardian, and KENT, after a review of all the then cases, says they all agree that a party dealing with an executor is safe if he is no party to his fraud, and has no knowledge or proof that he intended to misapply the proceeds, and was not in fact by the very transaction applying them to the extinguishment of his own private debt. This necessarily refers to a debt known to be his own debt, to which the fund could not be properly applied.

We have examined with care all the cases referred to by counsel for appellee, and many others, where a party receiving trust funds in payment of a private debt to himself has been held chargeable as a trustee, and we find no case among them where the party so charged was not aware, at the time of receiving such trust funds, that the debt to which it was applied was a debt to the payment of which the trustee could not lawfully apply the trust fund. The receipt of such money, under such circumstances, is a plain fraud.

Let us consider a moment the character of these debts, which in this case are called private debts. The debt for the loan of \$52,000, made on June 11, 1877, may be taken as an example. Waldron called at the bank, saying he wished to borrow a given sum of money for the use of the village of which he was treasurer, to pay warrants in anticipation of the collection of taxes. The money was, upon that statement, lent to him upon his own personal note, secured by collaterals. There was no fraud in believing this state-

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ment to be true, nor is there any proof that it is not true. The money thus lent was placed to his credit as treasurer, and paid out by him on checks drawn by him as treasurer, a large portion of which is proven to have been paid upon proper warrants upon the treasury, and no part of which is shown to have been paid out for other purposes. The bank assumed, and it had a right to assume, that this money was intended to be applied to the proper payment of valid warrants, in anticipation of the collection of taxes, and on the 1st of December, 1877, one day after a large amount of money had come into the treasury from the collection of taxes by the county treasurer, when Waldron proposed using so much of that fund for paying off the unpaid balance of that loan, the officers of the bank were authorized to assume, and in good faith did assume, that the money was by such payment being applied in refunding money paid out on such warrants on the treasury from the proceeds of the original loan. If this were true in fact, it was not a misapplication of the trust fund, but was a proper and just application of the fund. Had Waldron had abundant means of his own, and had he, when there was no money in the treasury, paid with his own money warrants properly drawn upon the treasury to the amount of \$50,000, he would have thereby in equity become entitled (by subrogation to the rights of the holders of such warrants) to apply to his own use so much of the public moneys afterward coming into his hands as needed to refund to him the amounts so advanced.

It follows that under the circumstances, at the time when the officers of this bank received payment of this loan, they were not aware, that as between the village of Hyde Park and Waldron, he had not lawfully and equitably the right to apply the public fund to the payment of this debt. They must be assumed to have known the law in relation to the transaction, but the law does not impute to them omniscience as to the facts. Taking the facts as these officers believed they were, and as they had good cause to believe, the payment would not have been a misappropriation of the funds. They are not chargeable with fraud, collusion, or gross negligence.

The case *In re Gross*, L. R., 6 Ch. App. 632, is cited as against this position, but it is not in point. There, as here, the funds were known to be trust funds. There, as here, the funds may be said to have arisen from moneys advanced by the bank upon the personal credit of the officer and trustee, but at the time when it was proposed by the bank to apply the trust fund to the private account of

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the officer, it was known that the officer was in default, and had the officer been present and offered to so apply the trust fund, called the "police fund," the bank could not at that time have accepted the same without being knowingly a party to the misapplication. The court said: "If a banker receives from a customer holding a trust account a check drawn on that account, he is not in general bound to inquire whether that check is properly drawn. Here the customer has drawn no check, and the bankers seek to set off the balance of his private account against his credit on what they knew to be a trust account." It was very properly held that the set-off could not be allowed. The court would otherwise have permitted the bank to make a known misapplication of a trust fund.

So in *Bodenham v. Hoskyns*, 13 E. L. & E. 222, Parks was the agent of Bodenham, and kept the moneys of his principal in the bank of Hoskyns, in a deposit account headed "Rotherwas account," and at the same time kept his own moneys in the same bank in a deposit account in his own name. After Parks was known to the banker to be insolvent, and when his private account was largely overdrawn, the bank, with the consent of Parks, transferred all the moneys standing to his credit on the "Rotherwas account" to his credit on his private account, which still left that account overdrawn. The bank was very properly held to be a party to that breach of trust. The officers of the bank knew, at the time of the appropriation of the trust funds, that they were the funds of another intrusted to the care of their debtor, and that the debt to which they were applied was a strictly private debt, to which the trust funds could not properly be applied. The court says: "They were aware of the circumstances which made it a fraud in Parks to make the transfer, * * * and they concur in the transaction." In the case at bar the officers had no knowledge or suspicion of the circumstances which made it a fraud in Waldron to pay these notes from the village funds.

In *Jaudon v. City Bank*, 8 Blatchf. 430, the trustee borrowed money from the bank for his own use, and pledged certificates of stock issued to him, as trustee for complainant, by name; and it was ruled that the bank held them for the complainant, the court saying: "The transaction of the loan indicate * * * that he was borrowing money for his private use." In the case at bar the transaction of the loan did not indicate that he was borrowing the money for his own use. He professed to be borrowing for the use

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of Hyde Park, to pay warrants in anticipation of the collection of taxes.

It does not seem necessary to review other cases in detail. The teaching of all the authorities is consonant with the proposition that to charge a stranger as a party to the misappropriation of a trust fund, such stranger must knowingly partake in the breach of trust,—that he must know or have proof of facts which in law characterize the transaction as a breach of trust.

It is no doubt true that where a stranger receives moneys of a trust fund from the trustee as a gift, or without a valuable consideration, though in ignorance of the character of the moneys received, he may be held as a trustee; but where such stranger to the trust has in good faith paid a valuable consideration, or has materially changed his condition, so that he cannot be restored to his original advantages, that doctrine does not apply. In the case at bar the money was in good faith received by the bank from a man in good credit, and with assets in his hands of his own to the value of over \$30,000, and his note and valuable collaterals were surrendered to him. It is now proposed, after that man has become insolvent, and has been stripped by complainant of all his assets, and has died, to rescind the payment to the bank, without restoring that for which it was paid. This, it seems to us, would be grossly unjust.

The judgment of the Appellate Court is therefore reversed, that the Appellate Court may reverse the decree, and remand the cause to the Circuit Court, for proceedings not incompatible with the views of the law herein expressed.

Judgment reversed.

SCOTT and SHELDON, JJ., dissenting.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

NOBLESVILLE AND EAGLETOWN GRAVEL ROAD. COMPANY V.
GAUSE.

(78 Ind. 142.)

Master and servant — course of employment.

A toll-gate keeper having charge of the gate at all times, but not required to collect toll at night after nine o'clock, let the beam of the gate down upon the plaintiff, who was endeavoring to pass the gate after that hour, and injured him. *Held*, that the company was liable. (*See note, p. 226.*)

ACTION of damages for personal injuries. The opinion states the facts. The plaintiff had judgment below.

D. Moss and R. R. Stephenson, for appellant.

W. Garver and R. Graham, for appellee.

ELLIOTT, J. We are not required to critically examine the pleadings in this case, as the only questions argued are those arising upon the ruling denying appellant a new trial. In order however to understand the force of objections urged against rulings upon instructions, it is necessary to briefly summarize some of the leading facts stated in appellee's complaint and established by the evidence. The appellant was the owner of a toll-road,

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and had constructed across it for use as a toll-gate a rude wooden beam of large size, which could be raised or lowered by the gate-keeper. The appellee was riding along said road after night in a vehicle drawn by one horse, driven by her brother; the toll-gate-keeper, as the vehicle was passing the gate, let the beam down, and inflicted personal injury upon the appellee. There was some evidence tending to show that the gate-keeper was the agent of the gravel road company, for the purpose of collecting toll only until nine o'clock, P. M., and that the act complained of happened some time after that hour. There was however uncontradicted evidence showing that the gate-keeper was in sole charge of the toll-house and gate at all times, and that he was the only agent or officer of the corporation who had control of that property.

[Minor matters omitted.]

The appellant complains of the refusal to give the second instruction asked by it. That instruction is as follows: "If you find from the evidence that the defendant only required its gate-keeper to take toll on its road from five o'clock, A. M., until nine o'clock, P. M., after the last-named hour its gate-keeper ceased to be in its employment." The court did right in refusing this instruction. It was not relevant to the case made by the evidence, for there is no evidence showing that the gate-keeper's employment ceased at nine o'clock, P. M., of each day. The gate-keeper was in charge of the toll-house and appurtenances, and his duty was a continuous one, not terminating at any particular hour of the day. The gate was intrusted to his management at all hours, and he was therefore at all times the servant of the company, so far as the care and management of the gate were concerned, whether his right to gather toll did, or did not, cease at nine o'clock of each night. The instruction was rightly refused, for the further reason that it narrows the question of employment to the continuance of the right to collect toll. It may well have been that the duties of the servant extended beyond the hours prescribed for taking toll, for he was put in exclusive charge of the toll-house and its appurtenances, and it would have been erroneous to have confined the question of agency to the right to gather toll. A further reason justifying its refusal is, that the law upon the subject of master and servant was correctly stated in the instructions given by the court, and quite as favorably to appellant as counsel had a right to ask.

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The third instruction asked is, in effect, the same as the second, and for reasons just given, was properly refused.

Counsel have cited cases declaring the familiar rule, that a master is responsible for the acts of the servant only when the latter is acting within the scope of his employment, but this was an unnecessary work, for the general rule is too well settled and understood to need support from adjudged cases. The question here is not as to the general rule, but as to whether these particular instructions express, and apply it correctly. The general rule is not questioned, but the question is, whether the appellant's instructions gave it a proper application. It is very apparent, in this case, that the servant's duty did not terminate with gathering each day's toll, but that it extended to the control of the gate, and its appliances, and if, while managing them for the master, he negligently inflicted an injury upon a traveller, who was free from fault, the rule of *respondet superior* must prevail.

[A minor matter omitted.]

Judgment affirmed, at costs of appellant.

Judgment affirmed.

NOTE BY THE REPORTER.—There can be no doubt that a master is liable for the consequences to third persons of acts done by his servant in the "course of his employment." *Helyear v. Hawke*, 5 Esp. 72. So long as the act is in the "course of the employment," the master is responsible, whether it is of omission or commission, in conformity to or disobedience of the master's order, by negligence, fraud, deceit, or even willful misconduct. *Smith Mast. & Serv.* 151. So the master is liable for the consequences of excessive force in the execution of a lawful order. *Higgins v. Waterilet Turnpike Co.*, 46 N. Y. 23; s. c., 7 Am. Rep. 293; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155; s. c., 23 Am. Rep. 442. But the master is only liable for the consequences of the servant's act when it is in the "course of his employment," and to determine this fact has frequently given the courts a great deal of trouble.

As to negligent acts: Although the master would be liable for an injury through the negligence of the driver of his street car to a passenger riding without paying fare, by invitation of the driver, *Wilton v. Middlesex R. Co.*, 107 Mass. 108; s. c., 9 Am. Rep. 11; *Brennan v. Fairhaven and Westville R. Co.*, 45 Conn. 284; s. c., 29 Am. Rep. 679; because those in charge of the cars are employed to solicit passengers and carry them; yet he would not be liable for an injury to a bystander at a railway station received while helping the fireman take in water, at his request, *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112; s. c., 12 Am. Rep. 366; nor for an injury received by a bystander while uncoupling cars at the conductor's request, *Flower v. Penn. R. Co.*, 69 Penn. St. 210; s. c., 8 Am. Rep. 251; because these servants are not authorized to solicit such in aid in their duties.

If the third person knows the servant's act is contrary to his employment, he is without remedy; as where he rides on a freight train, with the conductor's assent, knowing it to be against the master's rules or orders, *Houston and Texas Cent. R. Co. v. Moore*, 49 Tex. 31; s. c., 30 Am. Rep. 96; but otherwise, if he was ignorant of the regulation. *Creed v. Penn. R. Co.*, 86 Penn. St. 139; s. c., 27 Am. Rep. 603. Again: The master is not liable if the servant's act is so manifestly outside his employment as to carry with it presumptive notice of his want of authority, as where a third person was permitted by rail-

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way section hands to ride on a hand-car, and there received injury. *Hoar v. Maine Cent. R. Co.*, 70 Me. 65; s. c., 35 Am. Rep. 230. And so in respect to acts of mere passive negligence resulting in injury to property, the master is not liable where the act cannot under any circumstances have been within the employment; as where a carpenter, using the plaintiff's shed for his master's work, accidentally sets it on fire in lighting his pipe. *Woodman v. Joiner*, 10 Jur. (N. S.) 853; *Williams v. Jones*, 3 H. & C. 256.

As to willful acts: The master is not liable for a wrongful, willful and unlawful act of his servant toward a third person, although the servant professes to be acting in the master's employment, if the act is entirely independent and outside of, and having no proper connection with the employment. As if the servant should make a wanton and unprovoked assault or wantonly drive his master's carriage against another. *McManus v. Crickett*, 1 East, 108. So where through the negligence of the defendant's driver the defendant's carriage wheels became entangled with those of the plaintiff, and the defendant's driver struck the plaintiff's horses with his whip, and they suddenly started and overturned the plaintiff's carriage, the court said: "If a servant, driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produces the accident, the master will not be liable. But if in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." *Croft v. Aheon*, 4 B. & Ald. 500. See *Limpus v. General Omnibus Co.*, 1 H. & C. 528.

To illustrate this distinction: Suppose it to be the duty of a servant to unload a locomotive tender by throwing the wood overboard, and in so doing he accidentally or purposely hits and wounds a bystander; the master will be liable. But if this unloading were no part of his duty at the time, and he should purposely throw a stick at and injure a bystander, the master would not be liable. So if a hod-carrier, employed on a third person's house, willfully bespatter the walls, his master would not be liable, *Garvey v. Dung*, 30 How. Pr. 315; but if a painter, employed to paint the walls, should willfully bespatter them with paint, the master would be liable. So where the crew of a vessel, without the master's knowledge or authority, fired a salute with a cannon on board, and thereby injured a third person, the master was held not liable, *Haack v. Fearing*, 4 Abb. Pr. (N. S.) 297; but if they had been instructed to fire the salute, and in so doing had accidentally or purposely inflicted the injury, so long as it was not purely felonious, the master would have been liable.

But in respect to public carriers it is held that the master owes the duty of protection of his passengers against even wanton assaults by his servants, entirely disconnected from the employment. As where a railway conductor kissed a female passenger against her will, *Croaker v. Chicago, etc., Ry. Co.*, 36 Wis. 657; s. c., 17 Am. Rep. 504; or assaulted a passenger on demanding his ticket, *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 208; s. c., 2 Am. Rep. 39; or brakemen unlawfully ejected a passenger by the conductor's order, *Passenger Ry. Co. v. Young*, 21 Ohio St. 518; s. c., 8 Am. Rep. 78; or officers of a steamboat assaulted a passenger, *Bryant v. Rich*, 106 Mass. 180; s. c., 8 Am. Rep. 311; *Sherley v. Billings*, 8 Bush. 147; s. c., 8 Am. Rep. 451; or an engineman maliciously sounded a locomotive whistle, *Chicago, etc., Ry. Co. v. Dickson*, 63 Ill. 151; s. c., 14 Am. Rep. 114; *Nashville, etc., R. Co. v. Starnes*, 9 Helsk. 52; s. c., 24 Am. Rep. 206; or a street-car driver threw one off the car platform who had stepped on it to cross the street, *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; s. c., 20 Am. Rep. 480; or a baggage-master struck with a hatchet a passenger in a quarrel about baggage, *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 120; s. c., 21 Am. Rep. 507; or a brakeman kicked a trespasser from the platform of a baggage-car, the rule of the company forbidding such riding, *Wetmore v. Little Miami R. Co.*, 19 Ohio St. 110; s. c., 2 Am. Rep. 378; or a brakeman assaulted a passenger, who resenting the ejection of his dog from a car, first laid hands on the brakeman, *Hansen v. European and N. A. Ry. Co.*, 62 Me. 84; s. c., 16 Am. Rep. 404; even for a malicious and criminal assault by the servant on a passenger in carrying out a supposed order of the master. *McKinley v. Chicago, etc., Ry. Co.*, 44 Iowa, 314; s. c., 24 Am. Rep. 748.

(The contrary doctrine of *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 123; s. c., 7 Am. Rep. 418, has been substantially overruled. In that case a passenger on a street car, wishing to alight, passed out on the platform and asked the conductor to stop, telling him she

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would not get off until the car had come to a full stop; whereupon, while the car was in motion, he threw her from the car with violence. It was held that the company was not liable. It is hard to reconcile this with the *Rounds* case, *supra*, unless we hold that it is no part of a conductor's duty to help passengers off street cars; for in *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49, it was held to be part of his duty to help them on. The *Isaacs* case would probably not now be recognized as law, and our State would probably agree with the weight of authority that a public carrier is liable for an assault by its servant on a passenger, such as that in the *Isaacs* case. Mr. Wood disapproves the decision in his work on Master and Servant. The Court of Appeals began to steer around it in *Shea v. Sixth Avenue R. Co.*, 62 N. Y. 180; s. c., 20 Am. Rep. 490; and in *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, Judge ALLEN, who gave the opinion in the *Isaacs* case, admitted that it had been questioned, and was a "border case," and "may seem to infringe upon some of the other reported cases;" and declared that to absolve a master, it must appear "that the servant committed the act wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by the wrongful act to execute it." Mr. Thompson, in *Carriers of Passengers*, p. 306, says of it: "The court held that the principal was not responsible for this misconduct of his servant, and assigned as a reason, *inter alia*, that 'the defendant could not lawfully have done it, and therefore no authority could be implied in the conductor to do it.' The facility with which the Gordian knot of *respondent superior* is thus cleft to the heart must be startling to even the superficial thinker. If we assume that a corporation can do no wrong, then it would seem to be useless to discuss whether the wrongs of its agents can be imputed to it."

The test of the master's responsibility is not whether the act was done according to his instructions, but whether it was done in the prosecution of the business that the servant was employed by the master to do. *Cosgrove v. Ogden*, 49 N. Y. 255; s. c., 10 Am. Rep. 361; *King v. N. Y. Cent., etc., R. Co.*, 66 N. Y. 181; s. c., 23 Am. Rep. 37. As where the superintendent of a lumber yard, in violation of his employer's directions, piled lumber on a sidewalk, where it fell and injured a person, the master was held liable. *Garretson v. Dueneke*, 50 Mo. 104; s. c., 11 Am. Rep. 405.

In regard to the matter of disobedience this distinction must be observed: If the servant in doing a particular act in a particular manner departs from the appointed mode of performance to inflict a wanton injury on a third person, the master will not be liable. As where the owner of a building instructs his servant to throw the snow from the roof into a vacant adjoining lot, where no one would be endangered, and the servant, disregarding the direction, carelessly throws it into the street and injures a person, the master will be liable; but if the servant intentionally threw it on the passer, the master would not be liable, for he had not engaged the servant to throw snow into the street. *Cosgrove v. Ogden*, 49 N. Y. 255; s. c., 10 Am. Rep. 361; *King v. N. Y. Cent., etc., R. Co.*, 66 N. Y. 181; s. c., 23 Am. Rep. 37.

These familiar principles have received recent illustration in several cases. In *Evans v. Davidson*, 53 Md. 945; s. c., 26 Am. Rep. 400, in the absence of his master a general farm servant, working in his master's cornfield with other servants, undertook to drive out a cow of the plaintiff which had broken into a field, and in so doing negligently struck her with a stone and killed her while she was in the field. The master was held liable.

On the other hand: In *Stevens v. Woodward*, 44 L. T. (N. S.) 153; 6 Q. B. Div. 318; the plaintiff, a publisher and bookseller, occupied the ground floor of the same house in which the defendant, a solicitor, occupied the second floor. One evening when the defendant was absent from his office, his clerk went to a lavatory in the defendant's room and left the water tap turned on. The water overflowed the basin and penetrated through the floor into the plaintiff's premises. A separate lavatory was provided for the clerk, and he had strict orders from the defendant not to enter the room in his absence. The master was held not liable. The court said: "What possible part of the clerk's employment could it be to go into his master's room and use the lavatory? How is it incident to his employment? It was no more a portion of his employment than if he had gone up two pair of stairs to his master's bedroom, and washed his hands there. He had no business to be there at all; it was neither within the scope of his authority, nor incident to the normal duties of his employment."

And in *Gilliam v. S. and N. Ala. R. Co.*, Alabama Supreme Court, 1892, where a rail-

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way conductor stopped his train near the plaintiff's house, entered the premises, seized the plaintiff's minor son, and carried him on the train to the next station, the railway company was held not liable. The court, by BRONK, J., observed: "The case of *M'Manus v. Crickett*, 1 East, 106, is the leading authority on this question. That case draws a distinction between willfulness and negligence, holding that when the servant, in the performance of his master's service, by his negligent act does an injury to another, the master is liable in damages. When however the act which produced the injury was intentionally done, although done while in the performance of his master's service, then the master was not liable, unless he commanded the act, or was present and did not dissent from it. The rule as stated above has never been fully satisfactory. Since railroads have been introduced, and since they have monopolized in large degree the land travel and transportation of the country, many of the revising courts of the country have modified the rule. The modification however is confined to acts which are within the range of the agent's employment, or delegated authority. The precise modification is, that if the agent while acting within the range of the authority of his employment does an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of the authority conferred upon him, or implied in his appointment, the master or employer is responsible in damages to the person thus injured. But if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not. * * * The older cases follow the doctrine declared in *M'Manus v. Crickett*, *supra*, and relieve the master or employer from liability for tortious acts of the agent, if intentionally done, although within the range of his duties, unless the tortious act was commanded, or adopted by the master. * * * In *R. R. Co. v. Webb*, 49 Ala. 240, this court held that a railroad company cannot be sued in trespass for the willful tort of its employee, unless the act was previously ordered or subsequently ratified by the corporation. We think the principles there announced should be so far modified as to limit its application to tortious acts of the agent done outside of the range of his employment. To this extent we adopt the modified rule, as applicable to railroads and their employees."

When a railway passenger on arriving at his destination missed his watch, and supposing it to have been stolen, refused to leave the train until he got it, and the conductor consented that he might remain on the train until it reached another station, and after the train had started and a partial search had been made, a passenger asked who he thought had his watch, when he replied, "that fellow," pointing at the brakeman, who immediately struck him in the face with a lantern, *held*, That the facts showed a right of action against the railroad company, and that the company occupied the same position toward the passenger as if he had paid his fare to such other station. *Chicago & Eastern Illinois Railway Co. v. Flezman*, Supreme Court of Illinois, May 13, 1882.

As to the master's liability in cases of the servant's unauthorized use of the master's team, and the like, see *Maddox v. Brown*, 71 Me. 432; s. c., 36 Am. Rep. 336; *Stone v. Hills*, 45 Conn. 44; s. c., 29 Am. Rep. 635.

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BILLMAN V. INDIANAPOLIS, CINCINNATI AND LAFAYETTE
RAILROAD CO.

(76 Ind. 106.)

Negligence — remote cause of injury.

If the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the owner of the latter may recover therefor from the railroad company.*

ACTION for negligently killing a horse. The opinion states the case. The defendant had judgment below.

O. J. Glessner and *E. S. Stillwell*, for appellant.

L. J. Hackney, for appellee.

ELLIOTT, J. This appeal presents the question of the sufficiency of the complaint of appellant, by whom this action was instituted.

It is unnecessary to do more than state, in bare outline, the allegations of the complaint, for the objections urged against it here, and which prevailed against it in the trial court, are of such a character as to require only a very general statement from us. It is alleged that the servants and agents of the appellee managed and operated the locomotive and cars of the railway company in such a recklessly and culpably negligent manner, as to willfully and wrongfully cause a team of horses, belonging to one Zero Carter, to take fright and run away, and that because of such fright, and while unmanageable and running away, they ran against the horse of appellant and caused its death.

In a carefully prepared and very able brief, appellee's counsel urges that no cause of action is shown, because the result was one which the appellee's servants could not have anticipated, and because the injury was not the proximate result of the negligence of the servants of the appellee. The argument is built, and built with skill, upon the maxim, *causa proxima, et non remota, spectatur*.

* To same effect *Lee v. Union R. Co.* (12 R. I. 383), 34 Am. Rep. 668. See also *Chicago, etc., R. Co. v. Dickson* (63 Ill. 151), 14 Am. Rep. 114.

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It is true, as urged by counsel, that the injury alleged as the cause of action did not directly and immediately result from appellee's negligence, for there was an intervening agency. The premise is well assumed, and the question is : Does the conclusion drawn by the appellee logically follow ? If the maxim quoted is to be given the wide sweep which appellee claims, then, wherever there is an agency intervening between the original cause and the injury, there can be no recovery. This is not the law. An intervening agency does not always shield the wrong-doer from responsibility, where the injury flows from his wrongful act. This doctrine is a well established one. It is said, by an English writer of acknowledged ability and learning, that "The general rule of law however is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer." *Ad. Torts*, § 12.

The very old and very famous case of *Scott v. Shepherd*, 2 W. Bl. 892, distinctly declared that a wrong-doer, who wrongfully set in motion the agency which caused the injury, was liable, although between him and the injury there were intervening causes, and this case has received the unquestioning sanction of courts and authors. An eminent American author, in discussing this subject, says : "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent." *Cooley on Torts*, 70. The fact, that between the wrongful act of appellee and the injury complained of, there was an intervening cause, is not sufficient to defeat a recovery.

The injury for which a recovery is sought is not so remote from the original wrong as to defeat the right to recover for the damages flowing from the injury. The wrong of appellee set in motion the cause which produced the injury. There are many cases which support the theory upon which appellant's claim is rested. The case of *Thomas v. Winchester*, 6 N. Y. 397, is an important and instructive case upon this point. In that case a dose of dandelion was prescribed for a person who was at the time ill. The prescrip-

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tion was presented at the drug-store of Dr. Foord, and the medicine obtained, which was administered to the person for whom it was prescribed, and great suffering resulted from its use. It was afterward ascertained that the drug was belladonna, and not dandelion. The drug was taken from a jar of medicine, prepared by the defendant, a manufacturing chemist, and which had been by him labelled as extract of dandelion. The defendant sold the jar and its contents to one Aspinwall, a wholesale dealer in drugs, by whom it was sold to Dr. Foord, the retail dealer, from whom the defendant purchased it. The court adjudged the defendant liable.

COCKBURN, C. J., in *Clark v. Chambers*, 3 Q. B. D. 327, very carefully investigated the question here under examination, and in an opinion of great force held that the author of the original wrong was liable, although the act of another had wrongfully intervened. In that case the defendant had wrongfully placed a dangerous spiked hurdle in a private way along which the plaintiff had the right to pass. Some person, without the knowledge of the defendant, moved the hurdle a short distance. The plaintiff, in travelling the way in a dark night, and thinking to avoid the original position of the hurdle, came in collision with it and was injured. Judgment was given in his favor. Many cases were reviewed, among them *Scott v. Shepherd*, 2 W. Bl. 892; *Dixon v. Bell*, 5 M. & S. 198; *Ilott v. Wilkes*, 3 B. & Ald. 304; *Illidge v. Goodwin*, 5 C. & P. 190; *Lynch v. Nurdin*, 1 Q. B. 29; *Burrows v. The March, etc., Co.*, L. R., 7 Exch. 96.

In *Ricker v. Freeman*, 50 N. H. 420; s. c., 9 Am. Rep. 267, the general doctrine of liability, where there is an injury resulting from a remote wrong, is considered with care, and a result reached in harmony with the cases decided by the New York court.

The Supreme Court of Minnesota, in *Griggs v. Fleckenstein*, 14 Minn. 81, had occasion to apply the law to a case where the facts were substantially these: The defendant negligently left a team of horses, unhitched and unwatched, upon the street of a town. They ran away, and ran against the team of another person, hitched to a post on the street, caused it to take fright and run against a horse and sleigh of the plaintiff. It was held that the defendant could not escape liability upon the ground that the injury was too remote.

The case of *Weick v. Lander*, 75 Ill. 93, is a well-reasoned and interesting case. The facts in this case, shortly stated, were that a

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builder wrongfully placed an obstruction in a public street in the city of Chicago. Two teams and wagons, employed in hauling sand, were passing upon the street, going south. When opposite the obstruction, an express wagon, moving north, ran against the obstruction and also struck and stopped the front sand wagon, and the tongue of the rear sand wagon ran against and killed a lad who was riding in the front sand wagon; and it was held that the builder was liable, because the wrongful obstruction was the cause of the boy's death.

There are several cases in the Supreme Court of Massachusetts, in which the question we have under examination is discussed, and discussed with learning and ability. In one of these cases, that of *Powell v. Deveney*, 3 Cush. 300, an empty truck was wrongfully left standing upon a public street; on the opposite side of the street was a loaded truck to which a team of horses was attached. The driver of another truck in attempting to pass between the horses' heads and the empty truck on the opposite side of the street, drove against the last-mentioned truck, which caused the shafts of his truck to whirl around and injure a person walking along the sidewalk. And it was decided that the owner of the empty truck was liable to the injured person. Another of the cases in the reports of the State to which we have referred collects and reviews many of the earlier cases, and holds that the doctrine of the case last cited is the correct one. In the case under immediate mention, *McDonald v. Snelling*, 14 Allen, 290, a carriage was negligently driven against a team of horses, causing them to take fright, run away and injure the plaintiff. In the opinion the maxim upon which appellee relies was much discussed and its true force and meaning explained. In still another case, *Lane v. Atlantic Works*, 111 Mass. 136, the same court gave the subject a very full examination, and held that although the act of another wrong-doer intervened between the original wrong and the injury, the injured person was entitled to recover. This ruling upon the point here mentioned is thus stated in the reporter's note: "In an action to recover for injuries caused by the defendant's negligence to which the fault of another person contributed, the defendant's liability is not affected by the fact that the fault of such person was not negligence but voluntary wrong-doing, if it was conduct which they should have apprehended and provided against." This goes far beyond what we should be required to do to uphold

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the present case, for here the act of the person whose agency intervened was not only innocent but was one which he could not have prevented, for it is shown that his horses were uncontrollable because of fright. There are other decisions of the Massachusetts court which are well deserving of examination, but we have only time to refer without comment to some of them. *Metallic C. C. Co. v. Fitchburgh R. R. Co.*, 109 Mass. 277; s. c., 12 Am. Rep. 689; *Lane v. Atlantic Works*, 107 Mass. 104; *Tutein v. Hurley*, 98 id. 211.

Two cases are cited by the appellee — *Pennsylvania R. R. Co. v. Kerr*, 62 Penn. St. 353; s. c., 1 Am. Rep. 431; and *Ryan v. New York, etc., R. R. Co.*, 35 N. Y. 210. In both of these cases it was held that a railroad company was not liable to the owner of a house consumed by fire communicated from another house situated at some considerable distance from it, and which was set on fire by sparks emitted from the locomotive of the company. These cases are in conflict with the overwhelming weight of authority and cannot be deemed true interpretations of the law. Judge COOLEY in his work on Torts cites a very great number of cases in which the Pennsylvania and New York doctrine is disapproved. Among the citations of this distinguished author are decisions of the English courts, of the Supreme Court of the United States, and of the courts of nearly all the States of the Union. Cooley on Torts, 76, n. Of the cases cited the Supreme Court of Illinois said: "These two cases stand alone, and we believe they are in direct conflict with every English and American case as yet reported involving this question." *Fent v. Toledo, etc., Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13.

There are cases in New York declaring and enforcing principles with which the case cited by appellee cannot be made to harmonize. One of these is the case of the apothecary, which we have already considered. Another is that of *Guille v. Swan*, 19 Johns. 381; 10 Am. Dec. 234, where the doctrine that one is liable for the remote consequences of his act was extended much beyond what would be necessary to support the appellant's complaint. In that case it was held that one who ascended in a balloon and came down in a garden of another was liable for the injury caused by the crowd of persons attracted to the garden by the descent of the balloon. Still another and perhaps a more strikingly illustrative case is that of *Vandenburg v. Truax*, 4 Denio, 464. In that case the defendant engaged in an altercation with a negro boy and menaced him with a weapon.

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The boy pursued by the defendant, fled in fear from the defendant and in the course of his flight, ran into the store of his employer, and striking against a faucet of a cask of wine, caused the wine to be spilled and lost, and it was held in a vigorous and forcible opinion, delivered by BRONSON, C. J., that the defendant was liable to the owner of the wine.

In *Webb v. Rome, etc., R. Co.*, 49 N. Y. 420 ; s. c., 10 Am. Rep. 389, plaintiff sued for injuries caused by fire communicated to a tie on the track of the railway company by the latter's locomotives, and by the burning tie to the plaintiff's property, and it was held that the action would lie.

In the still later case of *Pollett v. Long*, 56 N. Y. 200, the defendant negligently constructed a dam across a stream, which gave way and carried out another negligently constructed dam, and thus caused injury to plaintiff's property, and the defendant was held liable. The trial court instructed the jury that the injury was too remote, evidently acting upon *Ryan v. New York, etc., R. Co.*, *supra*, but the instruction was held erroneous and the judgment reversed. The same court in *Wasmer v. Delaware, etc., R. R. Co.*, 80 N. Y. 212 ; s. c., 36 Am. Rep. 608, held that a railway company was liable for any injury done by a runaway horse, the cause of the horse's fright being the negligent manner in which the company's servants ran a locomotive and train through the city of Utica. Counsel there argued : "The respondent should have been non-suited, because she failed to show that the negligence of appellant was the sole and proximate cause of the death. The runaway horse and wagon was the proximate cause of the accident." The case of *Ryan v. New York, etc., R. R. Co.*, *supra*, was cited by counsel, but the court passed it unnoticed. Without further citation of cases, we think it may be safely affirmed that upon the principle which governs the case before us, the court which decided *Ryan v. New York, etc., R. R. Co.*, *supra*, is clearly in line with the view to which we are here disposed to give our adherence.

It is not necessary that the precise injury which actually occurred could have been reasonably anticipated at the time the original wrong was committed. It is true that the resultant injury must be of such a general character as might have been reasonably foreseen and provided against. The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against. Says Dr. Wharton : "Certainly it will not be

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maintained that it is an unusual and unnatural thing for horses, when travelling on a road, to be frightened by extraordinary noises or sights. He therefore who on a road travelled by horses, makes such noises or exhibits such spectacles, is liable for any damage caused by a horse taking fright. This rule has been applied to protect the public, using a road, from the effect of a jet of water likely to frighten horses coming along it, the jet of water being caused by the defendants, the New River Company, in the exercise of their statutory powers ; and to make a town liable for objects left on a road having a like tendency to frighten horses." Whart. Neg., § 107. It is upon this ground that the cases proceed, which hold that a municipal corporation is liable for negligently permitting objects likely to frighten horses to remain upon, or in close proximity to, the public streets. Dill. Mun. Cor., § 1007. The wrong-doer, who does an act likely to cause horses to take fright, must be deemed to be responsible for injuries caused by horses running away under the influence of the fright. This responsibility is not to be confined to the horses which suffer directly and immediately from the fright, but must be held to extend to such injuries as may be reasonably expected to be caused by them while running away. It is not unusual or unnatural for horses, panic-stricken by fear, to run against and injure persons and property, and what is neither unnatural nor unusual the wrong-doer must be held to have anticipated. In illustration of the doctrine that it is not necessary that the particular injury could have been foreseen, may be cited the case of *Hill v. Winsor*, 118 Mass. 251. In that case the court upon the trial instructed the jury that "The accident must be caused by the negligent act of the defendants ; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other. Still, it is negligence for me to put this obstruction in the highway, and that may be the natural and necessary cause." This instruction was held to be correct, the court saying : "It cannot be said as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to

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those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that now it appears to have been a natural and probable consequence. *Lane v. Atlantic Works*, 111 Mass. 136, and cases cited." What is usual, the law requires the person doing a wrong to anticipate and provide against. A wrong-doer cannot escape liability upon the ground that the injury resulting from the wrong was too remote, if it was in fact a usual or probable one. Proximate results are such as are natural or usual. It was said in *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, that "A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence; such as are usual and as therefore might have been expected." Speaking of the quotation we have made from the case cited, Mr. Thompson says that the definition of the court is given with little variation in many cases, and in support of this statement, a great number of cases are cited. 2 Thomp. Neg. 1083. In the case in hand the injury was a usual one, within the meaning of the law, for it was neither extraordinary or unnatural. The probability that horses lawfully driven upon a much-travelled public highway will take fright at extraordinary noises is one which he who causes such noises to be made must in contemplation of law foresee and provide against. Nor does this duty of forecasting stop at this precise point, for he must also foresee the ordinary behavior of horses fleeing under the influence of fear. To hold otherwise would be to enable the wrong-doer to protect himself from what might have been reasonably expected to result, by proof that he did not foresee what actually occurred. The law is not justly subject to the reproach of showing favor to any such doctrine. What was to have been expected in the ordinary course of things the wrong-doer did, in the eyes of the law, foresee and expect.

We are satisfied, that both upon principle and authority, it must be held that the injury for which the appellant sues is, as shown by the confessed averments of the complaint, the usual and proximate result of the wrongful act of the appellee.

The allegations of the complaint are unusually full and strong, and show not merely passive negligence, but wanton and willful wrong. The use of the steam whistle by locomotives may be of such

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a character as to constitute an actionable injury. The rule upon this subject is thus stated by an American author : " Where the whistle is negligently and wantonly sounded, so that horses lawfully in the vicinity are caused to run off and injury is inflicted, it is correctly held that the company is liable." Wharton, § 836 ; *Voak v. Northern, etc., Ry. Co.*, 75 N. Y. 320. It is, as we understand appellee's argument, not denied that there are causes where the negligent and wanton sounding of steam whistles may constitute a cause of action; nor do we understand counsel as contending that the facts stated in the complaint are insufficient to bring this case within the rule. The contention is, not that the facts stated would not have constituted a cause of action in favor of the person whose horse took fright and run off, had injury resulted to him, but that the injury to the appellant is too remote even though the complaint shows an actionable wrong. The real question therefore which the course of argument adopted presents, is as to the remoteness of the injury. The question as to whether there was an original wrong is not, in fact, debated. Of course, there must have been an original wrongful act, and this presents incidentally only the question as to whether the sounding of steam whistles by locomotive engineers can be deemed to constitute actionable negligence. It is undoubtedly true that the law is much more liberal in favor of railway companies operating locomotives than others, for there are cases in which others than those engaged in operating railway engines would be liable, but in which no action could be maintained against the latter. But while this is so, there are cases where the railway company may be liable for the improper and negligent sounding of the whistle. Of course the mere sounding of the whistle cannot be deemed negligence, although blown in close proximity to the highway, and even though there are horses in the immediate vicinity. There may however be attendant facts and circumstances which show it to be culpable negligence. Whart. Neg., § 898, and author's note; *Voak v. Northern, etc., Ry. Co.*, *supra*; *People v. New York, etc., Ry. Co.*, 25 Barb. 199 ; *Culp v. Atchison, etc., R. R. Co.*, 17 Kans. 475.

There are, in this case, no facts or circumstances showing an excuse for sounding the whistle in the manner in which it was done ; on the contrary, it is fully and distinctly shown that the whistle was wantonly sounded at an improper place, in a willfully and dangerously negligent manner, and without excuse or justification. If there were facts, we deem it proper to add to prevent possible

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misunderstanding, showing a necessity for the use of the whistle, or even showing a reasonable excuse for using it at the place and in the manner in which it was used, then a rule different from that which we here apply would be applicable.

Judgment reversed.

SECOND NATIONAL BANK OF LAFAYETTE V. HILL.

(76 Ind. 223.)

Bank — surety — agreement to apply principal's deposit to his debt.

In an action by a bank against sureties on a promissory note discounted by it, it is no defense that before maturity the principal directed the bank to pay the note at maturity out of his general deposit in the bank, that the bank failed to do so, and subsequently allowed the principal to check the money out of the bank, although it knew of the suretyship at all times, and the deposit was sufficient to pay the note.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

J. M. Larue and F. B. Everett, for appellant.

W. D. Mote, for appellees.

MORRIS, C. This suit is upon a promissory note, dated April 12, 1877, executed by Samuel Hill, John Hair and William Mote for \$300, payable four months after date, to the order of the appellant, at its bank in Lafayette, with five per cent attorney fees and with interest at the rate of ten per cent per annum after maturity, without relief from valuation or appraisal laws. The suit was commenced in the Tippecanoe Circuit Court, and taken by change of venue to the Carroll Circuit Court.

The defendant Hill answered the complaint in three paragraphs, Though the record says that the answer contained four paragraphs. there are but three in the record. It is not material how this may be, as the answer was the separate answer of Hill. Judgment was rendered against him and in favor of the appellant, and he does not complain. We need not further notice the proceedings as to Hill.

Hair and Mote filed a joint answer in four paragraphs. The

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appellant demurred to the fourth paragraph of their answer. The demurrer was overruled. It then replied to the first, second, third and fourth by a general denial. There was a special reply to the fourth paragraph of the answer of Mote and Hair. The cause was submitted to a jury. Verdict for the appellant against Hill, and against it and in favor of Mote and Hair. Motion by the appellant for a new trial, which was overruled. Judgment upon the verdict. The evidence is made part of the record by bill of exceptions.

The rulings of the court upon the demurrer to the fourth paragraph of the answer of Mote and Hair, and on the appellant's motion for a new trial, are assigned as error.

The fourth paragraph of the answer of Mote and Hair admits the execution of the note in suit, and then states that the defendant Hill signed the note as principal, and that they, Mote and Hair, signed it as the sureties of Hill; that the bank knew at the time that Hill was principal, and they his sureties; that the note was given for money borrowed by said Hill of the appellant; that the appellant is a banking corporation, organized under the National Banking Law; that after the maturity of the note, said Hill made general deposits in the appellant's bank, from time to time, to the amount of \$8,000, and in sums exceeding the amount due on said note; that said Hill, prior to the maturity of the note, "had consented and directed the appellant to allow and pay said note, interest, etc., thereon at any time after its maturity, out of his deposits in said bank, if he should have any such funds in said bank to pay the same or any part thereof;" that after said note became due, the appellant had of the funds of said Hill on deposit in its bank, more than enough to pay said note, interest, etc.; that it failed and neglected to apply any of the funds of said Hill so on deposit in its bank as aforesaid (except \$53), in payment of said note, but long subsequent to the maturity of said note, suffered said Hill to check said funds out of said bank. Wherefore they say they are discharged.

The question raised by the demurrer to this paragraph of the answer is: Did the appellant, by failing to apply to its payment the money which Hill had on general deposit in its bank, at and after the maturity of the note, discharge Mote and Hair, the known sureties of Hill on the note? That the bank had a right so to apply the money which Hill had on general deposit after the maturity of the note, with or without the consent or direction of Hill, will not

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be seriously questioned. In speaking of general deposits, Morse says : " So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank. It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank ; a chose in action, not any specific money, or a right to any specific money." Against the debt thus due the depositor, the bank may set off any debt due from the depositor to it. Morse on Banking, pp. 30 and 42 ; *Commercial Bank, etc., v. Hughes*, 17 Wend. 94 ; *Beckwith v. Union Bank, etc.*, 4 Sandf. 604.

Though the funds deposited with the appellant might have been applied by it to the payment of the note in suit, the bank did not hold the funds, in any sense, in trust for the sureties of Hill on the note. Had Mote and Hair, as such sureties, paid to the appellant the note in suit, they could not, had the bank at the time been indebted to Hill on his deposit account in a sum exceeding the amount paid on the note, have required the bank to apply such indebtedness for their benefit, or to reimburse them for the money paid by them on the note for Hill's benefit. They could not have required this of the bank for the obvious reason that they could not have, under the circumstances, any right to or interest in the debt due from the bank to Hill.

In the case of *Voss v. German American Bank*, 83 Ill. 599 ; s. c., 25 Am. Rep. 415, the note sued on was as follows : CHICAGO, Oct. 4, 1873. Fifteen days after date we promise to pay to the order of the Germania Bank of Chicago three hundred dollars, at their office, with interest at the rate of ten per cent per annum after due, until paid. Value received. Signed. ALBERT MICHELSON. Indorsed : A. Voss." " The note," says the court, " appears to have been made for Michelson's benefit, and Voss to have been only a surety, as between himself and Michelson, and as Michelson is shown to have had funds on deposit in the bank, from time to time, after the maturity of the note, and before the bringing of the suit, to an amount exceeding that of the note, it is insisted that the bank was bound to apply such funds to the payment of the note, and that not having done so, Voss was discharged. And the case of *McDowell v. Bank of Wilmington and Brandywine*, 1 Harring. 369, and *Law v. East India Co.*, 4 Ves. 824, are cited as authorities, that under such circum-

stances, a surety will be discharged. Without remark upon or consideration of these authorities, we do not regard them as having application to the case in hand. We do not recognize, in such a case as is here presented, the existence of any such obligation as the one which is asserted by appellant's counsel."

The case of *McDowell v. Bank of Wilmington, etc., supra*, seems to be the other way. The bank had means in its hands which it might have applied to the payment of the note. The court says: "Upon what principle of justice can such a creditor in a court of equity claim to hold the surety bound, after the debt had been in point of fact paid, if the creditor had elected to say so or to so consider it. The creditor could have set off the debt and charged it in the account, and having the power, was it not his duty to do so in justice to the surety?"

The question is not what the creditor might or could have done, but was he obliged to do this or discharge the surety? The creditor might sue the principal debtor as soon as the debt matured, and thereby save the surety from future hazard, but he is not obliged to sue. He may delay the collection of his debt even until the principal debtor fails, without discharging the surety. To hold that the bank was obliged to apply the deposits made by Hill to the payment of the note, would be to compel him to collect his debt, though none of the parties bound to pay it had requested him to do so.

The case of *Martin v. Mechanics' Bank, etc., 6 Har. & J. 235*, is in point. The action was upon a bill of exchange for \$645, drawn by W. P. Strike on W. & A. H. Woods, payable to Martin, and was indorsed by him and others to the bank. The bill was dated August 24, 1819, and due at nine months. On the 20th of June, 1820, and after the bill matured, W. & A. H. Woods had on general deposit in the bank \$700, sufficient to pay the bill. The sum thus on deposit was not applied by the bank in payment of the bill, but soon thereafter paid out on the checks of the depositors. Martin, the indorser of the bill, contended that the \$700 on deposit June 20, 1820, should be held to be a payment of the bill; or if not, the transaction amounted, in law, to a waiver of the right of the bank to proceed against him as indorser; that he was exonerated from all liability. The court held that the deposit was not a payment of the bill, and that the failure of the bank to apply the de-

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posit to the payment of the bill did not release the indorser. The court also held that the deposits made from time to time, after the maturity of the bill, and the paying out of the same upon the checks of the depositors, did not indicate a purpose, on their part, to apply the money in payment of the bill, but rather the contrary; that under such circumstances, the law will not require the banker to dis-appoint its customers by such an application of his deposits.

True, it is averred in the answer, that Hill said to the appellant, some time before the maturity of the note, that when it matured, any sum that he might then have on deposit might be applied to its payment. But this is just what he said, by implication of law, whenever he made a general deposit in the bank. The act of making such a deposit was authority to the bank to apply the deposit to the payment of the note in suit. The statement of Hill gave the bank no additional authority. The checks subsequently drawn by Hill upon the bank were a withdrawal of his previous directions upon the subject. It was competent for Hill and the bank to make any disposition of the deposits, before their actual application, which they might see proper. The sureties of Hill had no interest in such deposits. They were not trust funds held by the bank for their benefit.

It is true, that the creditor, having obtained security for his debt, becomes a trustee of the same for all parties concerned. If he obtains judgment against the principal and takes out execution, but does not levy it, though the principal debtor has property on which a levy might be made, he does not, unless the execution operates as a lien, by delay, however long continued, discharge the surety; but if he causes a levy to be made, he cannot release it without discharging the surety to the extent of the value of the property levied upon. So in this case, the mere fact that the appellant might have applied the deposits to the payment of the debt is not enough. The debt due from the bank to Hill on his deposit account was not a collateral security in its hands to the debt due from Hill and the appellees to the bank. *Philbrooks v. McEwen*, 29 Ind. 347; *Hampton v. Levy*, 1 McCord Ch. 107; *Lang v. Brevard*, 3 Strobb. Eq. 59.

In the case of *Glazier v. Douglass*, 32 Conn. 393, the plaintiff sued the defendant, as the indorser of a note made by Henry Rogers & Co., for \$515, payable to the order of the defendant, which was indorsed by him, for the accommodation of the makers, to the plaintiff.

iff. At and after the maturity of the note, the makers, who became insolvent, were indebted to a firm, of which the plaintiff was a member in a sum exceeding the amount of the note sued on, and by a statute of the State the plaintiff had a right to set off the indebtedness of the makers of the note to said firm against the amount due on the note. The plaintiff did not do this, but with a full knowledge of all the facts, paid the makers the amount due them, and then brought this suit against the defendant as the indorser of the note.

The defendant insisted that the failure of the plaintiff to set off the amount due from Rogers & Co. to said firm, against the note sued on, released him from liability as indorser. The court held that he was not released. We quote from the opinion, as follows :

“By a series of decisions adopting the equitable principles of the civil law, there have been annexed to the undertaking of a surety in a case like this, three conditions, and if either is broken by the creditor, that undertaking becomes inoperative, and the surety is discharged.

“The first is that the creditor shall present the note to the maker for payment at maturity, and if dishonored, use due diligence in giving notice to the surety. The second is that no obligatory extension of the time of payment shall be given which will preclude the surety, if he pay the note to the creditor, from enforcing immediate repayment by compulsory process from the principal debtor. And the third is, that the creditor shall apply in payment of the debt, or hold in trust for the benefit of the surety, all securities which he may receive or procure for that purpose by contract or operation of law, so that if compelled to discharge the debt, the surety may be subrogated to them. * * * * *

“In respect to what shall be deemed a security within the meaning of the condition, there has been some contrariety of decision. The better opinion is, that it must be a mortgage, pledge or lien—some right to or interest in property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debts can be subrogated, and the right to apply or hold must exist and be absolute.”

Had Mote and Hair paid the note sued on to the bank, would their right to the debt due from the bank to Hill have been absolute? Could they, as against Hill or the bank, have claimed to be subrogated to that debt? Did the bank become the trustee of its

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own debt to Hill, and hold it intrust for Mote and Hair? We think the debt due from the bank to Hill for the deposits made by Hill was not a trust fund, that it was not held by the bank in trust for the appellees. *Pease v. Hirst*, 5 Man. & R. 88.

The question involved in this case is one of some practical importance, and we have endeavored to give it that consideration which its importance demands. We believe that the conclusion which we have reached will be found to be supported by the weight of authority and in agreement with the business usages of the country.

We think the court erred in overruling the demurrer to the fourth paragraph of the answer of Mote and Hair, and that the judgment below should be reversed.

It is ordered that upon the foregoing opinion the judgment below be reversed at the costs of appellee.

Judgment reversed.

MUELLER V. STATE.

(76 Ind. 310.)

Sunday — necessity — selling cigars.

Selling cigars on Sunday is not a work of necessity.

CONVICTION of violating Sunday law. The opinion states the case.

O. T. Boaz, for appellant.

D. P. Baldwin, attorney-general, and *J. B. Elam*, prosecuting attorney, for the State.

WOODS, J. The appellant was tried and convicted before a justice of the peace upon a charge of violating the Sunday law, in that on Sunday the 23d day of October, 1881, he was found at common labor and engaged in his usual avocation (vocation), to wit: Selling cigars and tobacco to one James Smith and divers other persons of unknown names, the transaction not being a work of charity or necessity.

Upon appeal to the criminal court the defendant was again tried,

convicted and adjudged to pay a fine. No question is made of the formal sufficiency of the affidavit. The appeal is based entirely upon the proposition that the finding of the court was contrary to the law and the evidence, and not sustained by sufficient evidence. The evidence was as follows: James Smith testified: "My name is James Smith; I reside in the city of Indianapolis; I know the defendant, Oscar Mueller; he is the person now here in court as the defendant in this court; he is over fourteen years of age; he is engaged in the business of retailing cigars, and has what is called a cigar store; he also keeps tobacco in other forms for sale at retail, and has no other business in connection with his cigar and tobacco business; I am a habitual smoker of cigars and chewer of tobacco, and on Sunday, the 23d day of October, 1881, I went into his place of business and bought of him two cigars and a quarter of a pound of chewing tobacco; he was then carrying on his business as usual and just as he did on week days; he delivered to me the said cigars and tobacco, and I paid him at the time ten cents for the cigars and twenty cents for the chewing tobacco, and he accepted the money. This was in the year 1881, and in the city of Indianapolis, Marion county, Indiana. There was nothing said between us about the said transaction except that I simply called for what I wanted and he waited on me just as he would on any other day of the week. There were several other persons in the place buying as I was, but I do not now know who they were."

Ed. Stewart testified: "I made the affidavit in this cause; I knew of cigars and tobacco being sold to James Smith as charged in the affidavit, and also to some others on the same day, but I did not know who any of them were."

The section of the law, under which the prosecution was instituted, is a substantial though not literal re-enactment of the act of February 28, 1855, 2 R. S. 1876, p. 483, and reads as follows: "Whoever, being over fourteen years of age, is found on the first day of the week commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor, or engaged in his usual avocation (vocation?), works of charity and necessity only excepted, shall be fined in any sum not more than ten nor less than one dollar; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travellers, families removing, keepers of toll-bridges and toll-gates, and ferrymen acting as such." Public Offenses, acts of 1881, p. 194, § 95.

The appellant's counsel, relying mainly upon the opinion in the case of *Carver v. State*, 69 Ind. 61 ; s. c., 35 Am. Rep. 205 ; asks us to declare judicially that cigars and tobacco, in the sense of the law, are necessities to those accustomed to use them, and hence that the defendant had the right to pursue on Sunday his usual vocation of supplying these articles to those who needed them.

The proper interpretation and application of a law like this is necessarily difficult. Necessity like fraud is incapable of a definition at once accurate and sufficiently comprehensive to accomplish the object of this enactment. The law however must often deal with the indefinable. The law-giver's work is to make the law in such general or specific terms as are deemed suitable to declare his purpose. The duty of the courts is not to defeat but to discover and enforce the legislative design.

The command of the law in question is that men shall not engage in common labor or in their accustomed pursuits on Sunday, works of charity or necessity excepted. What should be deemed a necessity, the law itself could not well have been made to say, and any attempt of the courts to frame a definition of general application would be more likely to produce confusion than certainty. The question in each case must be decided according to the circumstances, and is therefore more a question of fact than of law.

Much of the prevalent confusion and doubt upon the subject has arisen, probably, from attempts made to determine and declare, as by a rule of law, that which was properly determinable only as a matter of fact, or at most, of combined law and fact. For instance, it is said in *Carver v. State*, that "In this State it has been held that manufacturing malt beer, gathering and boiling sugar-water to prevent its waste, receiving the verdict of a jury by a court, and gathering the fruits of the earth to prevent their decay, and taking them to the market-place on Sunday, are works of necessity within the meaning of the present act." But a reference to the cases cited will show that each of them was decided upon its own circumstances. Manufacturing malt beer on Sunday was not unlawful, because the process could not otherwise be completed; gathering and boiling sugar-water, because it was necessary in order to save it; hauling melons to market, because, as the defendant in the case was situated, he could not otherwise have saved his property. But the cases are not authority to

the effect that if the defendant, in any of the cases, had done more than was reasonably necessary, he would not have been amenable to the law. To illustrate: The necessity of gathering the sugar-water as it runs is manifest, but whether the boiling of it is necessary, may depend on the means of storing and saving it which the party has on hand, or under the circumstances, ought to have had ready. The necessity, in any such case, is to be determined evidently as a matter of fact.

It is further said in the *Carver* case that the true rule was laid down in *Wilkinson v. State*, 59 Ind. 416 ; s. c., 26 Am. Rep. 84 ; namely: "That labor performed on Sunday, which is necessary, under any particular state of circumstances, for the accomplishment of a lawful purpose, is not a violation of the Sunday law;" and proceeding from this proposition, the opinion, apparently for the purpose of accurately stating the exact point decided, says : " Keeping a hotel in this State on Sunday is not unlawful. Keeping a hotel on Sunday, in the same way that it is usually kept on a week day, is not unlawful. It follows then that if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders and customers, on a week day, to sell cigars from the same stand in the same way on Sunday is not unlawful. Indeed, we see no difference, legally, between the act of selling a cigar under such circumstances, and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want, to a customer on Sunday for pay."

If hotel-keepers may maintain cigar stands, and sell therefrom on Sunday to their guests, boarders and customers; and ordinary dealers, who do not keep hotel, cannot sell from their places of business, it is evident that the users of tobacco or cigars will become Sunday customers of the hotels, and there will result an odious and intolerable monopoly, which ought to condemn the interpretation of the law that leads to it. Whether the hotel-keeper may provide and furnish cigars and tobacco, on Sunday, to his travelling guest, who may reasonably be supposed to have had no opportunity to supply himself for the day, need not be decided, as the question is not before us. But that he may not keep open a stand, bar or other place, for the purpose of general sales to resident customers or boarders, who, like other citizens, ought to anticipate and furnish a supply for their Sunday wants, seems clear. There should be no privilege allowed to the hotel-keepers of sell-

ing to his boarders and resident customers, which is not allowed to the keeper of a boarding-house or restaurant, or to other classes of dealers.

But the claim is made that it is not unlawful to sell cigars on Sunday to any one accustomed to use them, because "smoking a cigar, by those who have acquired the habit," is "clearly a necessity." Upon what principle the court can take judicial knowledge of such a fact, if it be a fact, is not plain. It is hardly probable that the law-makers contemplated that the cravings of a morbid and unnatural appetite should be deemed to create such an imperious necessity for appeasement as that the general requirement for Sunday observance should yield to it, while the supplying of the ordinary necessities of life, like food and clothing, by purchase and sale out of the stores, should be forbidden.

The drinking of intoxicating liquors is not unlawful upon any day; and upon all days, except Sunday and some other specified days, their sale is not unlawful. If it can be said by the court that a cigar is necessary to the smoker, it is no less certainly known that a drink is, in the same sense, needful to the drinker. The appetite for the latter is not weaker than the demand for the former. The law however specifically forbids the sale of intoxicating liquors on Sunday. He who uses them must therefore anticipate his necessity, and provide beforehand a supply for Sunday use; and no good reason occurs to us, why, under ordinary circumstances, the user of cigars or other forms of tobacco should not be required to be equally provident.

The rule which, in *Carver v. State, supra*, is declared to be the rule, is in fact a rule which cannot be practically applied without nullifying the law. To repeat it, the rule is, that labor which is necessary, under any particular circumstances, for the accomplishment of a lawful purpose, is not forbidden. This deduces the necessity from the lawful purpose; whereas, under the terms of the law, the purpose, or work done to accomplish it, can be lawful on Sunday, only when under the circumstances there was a present and pressing necessity for its accomplishment on that day. Under the rule, as stated, any lawful purpose may be accomplished by doing on Sunday, what under the circumstances was necessary to achieve it. The law however makes all purposes unlawful in so far as they require common labor or the pursuit of accustomed employments on Sunday, except works of charity or necessity. So

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that in order to determine what purposes may be lawfully attempted on Sunday, we are brought back to the original inquiry, what does necessity, as used in this law, mean? It may be said, as has been said before, that it does not mean an absolute or physical necessity, but a moral fitness or propriety of the work or labor done, under the circumstances of any particular case. *Morris v. State*, 31 Ind. 189, and cases cited. Generally speaking, it ought to be an unforeseen necessity, or if foreseen, such as could not reasonably have been provided against.

Coming to the case in the record, the evidence shows that the defendant on Sunday had his tobacco store open for business, without any pretense of necessity, except to sell in the ordinary way. This was an infraction of the law, if no sale had been made; but the particular sale charged to have been made to Smith is established by the evidence, and no special necessity for the transaction is disclosed. If it were conceded that an appetite or craving creates a necessity, it does not appear that Smith was suffering or bought for the purpose of immediate use. For all that is shown, he may have made the purchase as a matter of convenience only, in anticipation of future wants.

The judgment is affirmed, with costs.

Judgment affirmed.

MONTGOMERY v. BOARD OF COMMISSIONERS OF HAMILTON COUNTY.

(76 Ind. 362.)

Landlord and tenant — holding over — election.

A tenant under a lease for three years with a privilege of five more, holding over, is bound for the full further term of five years.

ACTION for rent. The opinion states the case. The defendant had judgment below.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellant.

J. Stafford and — *Boyd*, for appellee.

BEST, C. This suit was brought by the appellant to recover from the appellee \$250, alleged to be due him for the rent of cer-

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tain premises described in the complaint. A demurrer, for want of facts, was sustained to the complaint, and this ruling presents the only question in the record.

The facts averred are, briefly, that the appellant's vendor, on the 1st day of July, 1875, leased the premises in the complaint described, to the appellee, for three years from that time, for \$500 per year, payable semi-annually in advance, with the privilege of keeping them two years longer upon the same terms, at the option of the appellee; that the appellee took and retained possession of the premises for four years, paying the rent in accordance with the terms of the lease, and at the expiration of the fourth year quit the possession and refused to pay more rent.

This suit was afterward brought to recover the rent alleged to have accrued for the first half of the fifth year. The appellant insists, that under the facts stated, the appellee is liable for the rent for five years. This the appellee disputes, and this is the question presented.

The language of the lease, describing the duration of the term, is as follows: "For the term of three years, * * * with the privilege of five years at the same rate, at the option of the said board of commissioners."

The appellant, after stating that possession was taken in pursuance of the lease, alleges the facts which he insists show that the appellee exercised the option to hold the premises for five years, thus, "and that the defendant did continue to occupy said premises, and to pay to this plaintiff the rent provided for in said lease, and according to the terms and conditions thereof, until the 31st day of July, 1879, when the defendant notified the plaintiff that they would no longer occupy said premises, and offered to surrender the possession thereof to this plaintiff, which he refused, and has since refused, to accept."

It will be observed that it is not averred that the appellee, at or before the expiration of the term of three years, exercised the option to hold the premises longer, but it is alleged that possession was retained, and rent paid, in accordance with the terms of the lease, for one year thereafter, and it is insisted that these acts amount to an election to hold for the remaining two years. On the other hand, the appellee insists that these acts do not amount to an election to so hold; but as they are consistent with a tenancy from year to year, they create no other relation. In support of this position

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the appellee cites the case of *Thisbaud v. First National Bank of Vevay*, 42 Ind. 212. In that case the appellant's ancestor had leased to the appellee certain premises, for the term of five years from the 1st day of May, 1864, and the lease contained this stipulation: "It is agreed between said parties that said bank is to have the privilege of renting said premises for another term of five years, at the same rate of rent as specified for the first term of five years, payable in the same manner as above set forth." For eighteen months after the expiration of the five years, the lessee continued to occupy the premises, and paid three half yearly instalments of rent, according to the terms of the lease. Thereupon the appellant brought the action to recover the premises, upon the ground that the term had expired. This was resisted, and it was insisted that the retention of possession and the payment of rent amounted to an election to hold for five years longer, and was equivalent to a re-renting. The court however held that the retention of possession and the payment of rent were entirely consistent with a tenancy from year to year, and created no other relation.

The facts brought the case within the well-known rule of law, that "If a tenant holds over by consent given, either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year."

The lease was for five years, and no longer, and therefore, when the appellee occupied the premises thereafter, it held over, and was a tenant from year to year. It is true that it was entitled by the terms of the lease to re-rent the premises, but this it did not do, and therefore its occupancy simply constituted a tenancy from year to year.

The lease in this case is however quite different. The term did not necessarily terminate at the expiration of three years. Its termination depended upon the option of the appellee. If the option was exercised, the term continued for five years. There was to be no renewal, nor was there to be more than one term. That term was for either three or five years; its duration depended upon the appellee; until its termination there could be no tenancy from year to year. If the option was exercised, the term did not terminate at the end of three years. How was the option to be exercised? Simply by retaining possession. Nothing else was contemplated by

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the parties. Notice was not required, nor expected, and all the appellee had to do to exercise the option, was to keep the premises. This was done, and such act must be regarded as the exercise of the option. The appellee could either go out or remain in at the expiration of three years. If the option to remain under the lease was not exercised, it was the appellee's duty to surrender the possession, and as this was not done, the inference that the option was exercised would seem to be irresistible.

The case of *Delashman v. Berry*, 20 Mich. 292, was an action to recover the possession of premises held by a tenant. The premises were leased "for the term of one year, with the privilege of having the same three years at the same rent, and at the option of the lessee." Under this lease the tenant remained in possession for one year and five days, without giving any notice that he would remain longer, and the action was brought to recover possession on the ground that remaining in possession of them was not an exercise of the option to hold them longer than one year.

The court said: "The Circuit Court held in effect, that this continuance in possession, after the expiration of the first year, was not an exercise of the option thus to continue for the longer term; and that to give him the right to continue for the optional term, he was bound to give actual notice of such intention at the end of the first year, or at least, before the suit to eject him was commenced. Such a notice, had it been given, would have been a notice only of the lessee's intention to continue the same occupation, upon the same terms as before. And upon principle it would certainly seem that the actual continuance of such occupation was the best and most conclusive evidence of his intention to continue. And as it was at his option to have the term expire at one year or three years, and he had covenanted to deliver up possession at the end of the term, but one inference could legally and properly be drawn from such continuance, after the year, viz.: that he intended to continue rightfully according to the terms of his lease, rather than wrongfully in defiance of its provisions."

So in this case, we think the appellee's possession must be regarded as held under the lease, rather than in violation of its terms, and that the averments of the complaint are sufficient to show an exercise of the option to hold for the residue of the term.

For these reasons the court erred in sustaining the demurrer to the complaint, and the judgment should be reversed.

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PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the costs of the appellee, with instructions to overrule the demurrer and for further proceedings.

Judgment reversed.

HAZLETT V. SINCLAIR.

(76 Ind. 488.)

Deed — covenant running with land — to maintain line fence.

A covenant by the grantor in a deed forever to maintain a fence or wall on the line between the granted premises and the grantor's premises, runs with the land.

ACTION to recover expense of repairing a partition fence. The opinion states the case. The plaintiff had judgment below.

M. A. Moore and *G. C. Moore*, for appellant.

J. Birch, J. J. Smiley and *W. G. Neff*, for appellee.

ELLIOTT, C. J. This was an action by the appellee against the appellant for the recovery of money expended in repairing a partition fence. The only error assigned is that the court erred in sustaining a demurrer to the answer of the appellant.

The material allegations of the answer are in substance these: On the 16th day of December, 1858, one Simon Lisby was the owner of the lands now owned by the appellant and appellee; that on that day he conveyed to Richard M. Hazlett the land now owned by the appellant and which adjoins that of appellee; that the deed conveying said land contained the following covenant: "And the said grantors, for themselves, their heirs, assigns, executors and administrators, do hereby agree and covenant as a part of this conveyance, that they will forever maintain and keep up a good and sufficient fence or wall on the line between them and the said Richard M. Hazlett;" that appellant purchased of Hazlett and received from him a deed of warranty; that appellee also acquired title from the said Lisby, and that the deeds forming the appellee's

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chain of title all contained full covenants of warranty; that the fence named in the complaint is on the line designated in the deed of Lisby containing the foregoing covenant.

Appellant's theory is that the covenant in Lisby's deed to Richard M. Hazlett is a covenant running with the land, and imposed a burden upon the land, and that all of Lisby's grantees, near or remote, took the land charged with this burden. The appellee upon the other hand contends that the covenant was a personal one, creating a personal charge against Lisby, but imposing no burden upon the land which would follow it into the hands of his grantees.

Much reliance is placed upon the case of *Bronson v. Coffin*, 108 Mass. 175; s. c., 11 Am. Rep. 335. In that case the person from whom both of the litigants derived title had conveyed a strip of ground to a railway company, and in the deed of conveyance was written: "I, the said T. G. Coffin, hereby covenant that I and my heirs and assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of said railroad." This was held to be a covenant running with the land and not a mere personal covenant, the court saying: "It was therefore rightly ruled at the trial that the clause in Coffin's deed did not create a merely personal obligation, but constituted an incumbrance upon his adjoining lands." It was also held that a privity of estate was created, because such a covenant conveyed an easement in the lands of the grantor to the grantee. Cases are cited which strongly support the decision of the court. Among them are *Wheelock v. Thayer*, 16 Pick. 68; *Morse v. Aldrich*, 19 id. 449; *Savage v. Mason*, 3 Cush. 500; *VanRensselaer v. Read*, 26 N. Y. 558; *Woodruff v. Trenton, etc., Co.*, 2 Stockton, 489; *Carr v. Lowry's Adm'x*, 27 Penn. St. 257. The case of *Savage v. Mason*, *supra*, is said to be "the strongest case in favor of the position that the clause in Coffin's deed was a covenant running with the adjoining lands." In the case last named, a covenant very like that in the case we have in hand was held to run with the land, and it was said: "The liability to perform and the right to take advantage of this covenant, both pass to the heir or assignee of the land, to which the covenant is attached. This covenant can by no means be considered as merely personal, or collateral, and detached from the land." In

the case of *Easter v. Little Miami, etc., Co.*, 14 Ohio St. 48, the covenant in the deed was expressed in this language, that he, the grantor, "his heirs and assigns, should build and keep up a fence on each side" of the right of way granted, and this, after a very able and exhaustive discussion, was held to impose a burden upon the land of the grantor, which passed with it into the hands of his grantees. The Supreme Court of Vermont in *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550, in deciding upon the effect of a covenant very similar in its terms to that before us, examined with much care the ancient authorities, and held it to be a covenant running with the land. Among the authorities there cited is the old case of *Bally v. Wells*, 3 Wils. 25, where it was said: "If lessee covenants to build a wall and assigns over his estate, the grantee of the reversion shall have covenant against the assignee, notwithstanding the covenant wants the word assigns, yet every assignee, by accepting possession, hath made himself subject to all covenants concerning the land, but not to collateral covenants." In the case of *Boyle v. Tamlyn*, 6 B. & C. 329, BAYLEY, J., says: "Such a right to have fences repaired by the owner of adjoining lands is in the nature of a grant of a distinct easement, affecting the land of the grantor." In *Blain v. Taylor*, 19 Abb. Pr. 228, the covenant was very like the one upon which the present contest is waged, and it was held, that it created an interest in adjoining lands of the grantor, and ran with the land to those deriving title from him. In that case it was said: "Although a covenant is made by one for 'himself, his heirs and assigns,' yet if the thing to be done is merely collateral, and in no respect concerns the land, an assignee is not bound. * * The covenant in the case before us however is not collateral, but relates to the land itself. The keeping of a fence * * in repair affects the land as much as keeping a house or any other building on the premises, in repair."

It is true, as appellee asserts, that there must be a privity of estate between the covenantor and covenantee. There is in this case the requisite privity of estate. The grant of the strip of land and the covenant to maintain a fence imposed an easement in favor of the grantee upon the adjacent grounds of the grantor. This is expressly adjudged in most, and impliedly held in all, of the cases cited. This easement passes, and can only pass, with the grant of the dominant estate to which it is attached. *Moore v. Crose*, 43 Ind. 30; Wash. on Easem. 87. There was therefore privity of

estate between the covenantor and the covenantee; for the covenant operated upon the lands now owned by the appellee. Counsel are mistaken in their statement that the appellant never acquired any interest in the land now owned by the appellee, for as we have seen, such an interest was acquired, although it is true that the interest was but an easement. The appellee is therefore a privy in estate owning land burdened by a covenant running with it in favor of the appellant.

The case of *Block v. Isham*, 28 Ind. 37, is not in point. In that case the agreement was not embodied in the deed conveying the premises, but was a separate and independent agreement. Nor was there in that case any continuing covenant, but simply a personal contract that when one of the contracting parties used a partition wall built by the other, he should pay the one-half of the original cost thereof. It was held in *Taylor v. Owen*, 2 Blackf. 301, that a covenant granting the exclusive right to carry on a certain business upon premises demised to a lessee, and agreeing that such business should not be carried on by any person upon any other lands owned by the lessor, was a mere personal covenant. In that case it was said: "Such a right of the proprietor of real estate to carry on trade upon his premises, cannot be made the subject of a separate conveyance, so as to prevent the subsequent holder of the property, without his own agreement, from pursuing his lawful business there. This covenant between Owen and Taylor is entirely of a personal nature. It neither runs with the land of the covenantor, nor does it create any lien thereon, either legal or equitable." It is quite plain that the case from which we have quoted affords appellee no assistance.

It is claimed by appellee's counsel that he had no knowledge, either actual or constructive, of the right claimed in the land conveyed to him. It is said that he had no constructive notice, because he was bound to look only to the conveyances made by the grantor through whom he claims.

The rule undoubtedly is that a purchaser is bound to take notice only of such conveyances as have been executed by a grantor through whom he derives title. *Corbin v. Sullivan*, 47 Ind. 356; *Ware v. Egmont*, 31 Eng. L. & Eq. 89. It is also true however that he is chargeable with knowledge of all information supplied by the deeds, either of his immediate or remote grantors. *Wiseman v. Hutchinson*, 20 Ind. 40. The grant of the easement in the land

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now owned by appellee was contained in a deed of appellee's grantor, namely, that in which the covenant which gives rise to this controversy is written. In discussing the character of that covenant, it has been incidentally said that the covenant to keep and maintain the fence conveyed an easement in the adjacent lands then owned by the grantor. In Washburn on Easements, it is said: "And it may be stated, in general terms, that an easement to maintain a fence between two parcels may be attached to one in favor of another, if there be sufficient evidence of an original agreement to that effect between the owners." At another place the same author says: "But if a grantor, in terms, when granting lands by deed, covenant for himself, his heirs and assigns, to fence the premises, it would be a covenant which runs with the estate." P. 635. The doctrine of the author is supported by many cases cited in the notes to the text, and is, in fact, in principle the same as that declared in the cases cited by us. The interest which the appellant acquired with the estate conveyed to him was an interest in the land now owned by the appellee, and notice of this interest was furnished to the latter by the deeds of the grantor through whom he claims title.

That an easement is an interest in land is well settled. *Snowden v. Wilas*, 19 Ind. 10; Washburn on Easements, 5.

The court erred in sustaining appellees' demurrer to the appellant's answer.

Judgment reversed, with costs.

AMES IRON WORKS V. WARREN.

(76 Ind. 512.)

Conflict of laws — comity — chattel mortgage.

A chattel mortgage on property in Indiana, executed and recorded in another State, but not recorded in Indiana, and never delivered to the mortgagee, is invalid as against attaching creditors.

THE opinion states the case. The defendant had judgment below.

E. Griffin and C. F. Griffin, for appellant.

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ELLIOTT, C. J. The Ames Iron Works sold to Warren & Carter a steam-engine and boiler. The sale was made in Chicago, Illinois, on the 9th day of September, 1879, and the property was then in that city. At the time of the sale the purchasers executed their promissory notes for the unpaid purchase-money, and one month afterward executed a chattel mortgage to secure the purchase-money notes. The mortgagors were residents of Cook county, Illinois, at the time they purchased the property, and at the time the mortgage was executed by them. The mortgage was executed and recorded in the said county of Cook, in strict conformity to the statute of Illinois. The property was not in Illinois at the time the mortgage was executed, but had been brought by the mortgagors into this State, where it was at the time the mortgage was executed and recorded. Appellees levied an attachment upon the engine and boiler, and the contest is as to their right to hold the property discharged from the lien asserted by appellant.

A chattel mortgage, executed and recorded in the State where the property is situated, will, if valid under the laws of the place of execution, be enforced by the courts of the State into which the property is afterward brought by the mortgagor, unless there is some statute to the contrary. *Blystone v. Burgett*, 10 Ind. 28; *Offutt v. Flagg*, 10 N. H. 46; *Beall v. Williamson*, 14 Ala. 55; *Smith v. McLean*, 24 Iowa, 322; *Arnold v. Potter*, 22 id. 194; *Wilson v. Carson*, 12 Md. 54; *Jones v. Taylor*, 30 Vt. 42; *Jeter v. Fellowes*, 32 Penn. St. 465. This case does not however come within this rule, for the reason that the property was not in the State where the mortgage was executed and recorded.

It is the general rule that personal property is governed by the law of the domicile of the owner, irrespective of the situation of the property. By a legal fiction personal property is supposed to adhere to the person of the owner, and unlike real property, to be governed by the law of the place where the owner is domiciled, and not by the law of the *situs* of the property. This doctrine rests upon the maxim: "*Mobilia ossibus inhaerent.*" The general rule must be deemed settled, although many judges and many authors have spoken of it with bitter censure, and yielded to it with extreme reluctance. By force of this legal fiction, personal property, no matter how ponderous or unwieldy, in legal contemplation, changes location with every change of the owner's domicile. The fiction does, it must be owned, produce strange incongruities, and lead to

almost grotesque results. The rule is nevertheless as yet the generally accepted one. Story Conf. of Laws, § 379; Rorer Inter-State Law, 194; Am. L. Reg., November, 1881; Whart. Conf. of Law, § 297; *Murray v. Charleston*, 96 U. S. 432.

Recognizing the fact that the general rule is itself of doubtful soundness, courts have created many exceptions. An assignment of personal property, by way of mortgage, is an exception to the general rule. The law of the *situs* and not the *lex domicilii* governs chattel mortgages. The exception rests on solid ground, and is well supported by the adjudged cases. In the case of *Clark v. Tarbell*, 58 N. H. 88, it was held that a mortgage of chattels in the State of New Hampshire at the time the mortgage was executed, was invalid as against attaching creditors, although executed in conformity to the law of the State wherein the mortgagor was domiciled. It was there said: "If a foreigner or citizen of another State send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects it has the right to regulate. And if two persons in another State choose to bargain concerning property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country where the chattel is will be permitted to be affected by their contract." This question came before the Supreme Court of the United States in *Green v. Van Buskirk*, 7 Wall. 139, and it was held, reversing a decision of the Court of Appeals of New York, that a mortgage executed in conformity to the laws of the State of New York upon property at the time in the State of Illinois, was invalid as against attaching creditors, although the mortgagor was a resident of New York. The court there said: "It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the judgment in this case induces us to notice the ground on which they rested their decision. It is that the law of the State of New York is to govern this transaction, and not the law of the State of Illinois where the property was situated; and as by the law of New York Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by the attachment. The theory of the case is that the voluntary transfer

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of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge STORY says, 'yields, whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined.' There are other cases sustaining the proposition that a mortgage of chattels is governed by the law of the place where the chattels are located at the time of the execution of the mortgage. Among them *Rice v. Courtis*, 32 Vt. 460; *Martin v. Potter*, 34 id. 87; *Whitman v. Conner*, 40 N. Y. Supr. Ct. 339; *Golden v. Cockril*, 1 Kans. 259; *Denny v. Faulkner*, 22 id. 89; *Guillander v. Howell*, 35 N. Y. 657.

The chattel mortgage upon which the appellant rests its claim to the property in controversy never having been recorded in this State, and there never having been a delivery of the property to the mortgagee, must be regarded as invalid against attaching creditors.

Appellee's counsel have not favored us with a brief, and it is very probable that we have left interesting questions unnoticed.

Judgment affirmed.

FIRST NATIONAL BANK OF CROWN POINT V. FIRST NATIONAL BANK OF RICHMOND.

(76 Ind. 561.)

Bank — agency for collection — sub-agency.

Bank A. indorsed and transmitted to bank B., for collection on its account, a check which it owned. Bank B. indorsed and transmitted it for collection to bank C. with directions to credit bank B. with the proceeds. Bank B. on the same day failed, in debt to bank A. Bank C. collected the check and credited the proceeds to bank B., which was in debt to bank C. Before the collection the cashier of bank C. had heard of bank B.'s failure but did not notify the drawee, who had no notice. The bank examiner, without the knowledge or consent of bank A., credited bank A. and charged bank C. with the amount on the books of bank B. *Held*, that bank A. could recover the amount of bank C.

ACTION to recover proceeds of a check collected. The opinion states the facts. The defendant had judgment below.

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J. T. Elliott, C. H. Burchenal, J. H. Mellett, E. H. Bundy, J. T. Dye and A. C. Harris, for appellant.

J. P. Siddall, W. D. Foulke and J. S. Rupe, for appellee.

WORDEN, J. Action by the appellant against the appellee. Issue, trial by the court; finding and judgment for the defendant, a new trial having been refused.

The pleadings need not be noticed, as the whole case comes before us on the evidence. The following are the facts in the case, as shown by the evidence: The appellant is a National bank doing business at Crown Point, Indiana. The appellee is a similar institution, doing business at Richmond, Indiana. On and prior to January 18, 1875, the Cook County National Bank was a similar institution, doing business at Chicago, Illinois. There had been dealings between the appellant and said Cook County Bank, commencing in September, 1874, and continuing up to January 18, 1875, on which last day there was a balance standing in favor of appellant on the books of said bank of \$13,971.81. On January 16, 1875, the appellant owned a check for \$5,000, drawn by Wiggins & Cheesman, on the Richmond National Bank, Richmond, Indiana, payable to the order of A. E. Bundy, appellant's cashier; and on said day said cashier indorsed said check as follows: "Pay A. West, Cashier, for collection for account of First National Bank, Crown Point. A. E. Bundy, Cashier." (Said A. West being cashier of Cook County Bank.) Said check, so indorsed, was on said day, together with four other checks and drafts, owned by appellant, sent by mail to the Cook County Bank, inclosed in a letter, as follows:

"FIRST NATIONAL BANK,

"CROWN POINT, IND., *January 16, 1875.*

"A. WEST, Esq., *Cashier:*

Dear Sir—I inclose for collection and Cr. as stated below.
Yours respectfully,

A. E. BUNDY, *Cashier.*

"1st Pittsburgh, No. 923, on 3 Nat. N. Y.,.....	\$336 67
"Wiggins & Cheesman, on Richmond National	
Bank, fr.....	5,000 00
"Jacobs & Snyder, No. —, Proctor, Kean & Co.,..	8 64

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" Merchants' Nat., Chicago, No. 58,327, Merchants'	
Nat., N. Y.....	\$32 75
" A. Gregory, on Gregory, Cooley & Co., Chicago,	500 00
<u>"\$5,878 06"</u>	

Said other drafts and checks, amounting in the aggregate to \$878.06, were indorsed by said Bundy, cashier, to A. West, cashier, of Cook County National Bank. Said letter and inclosures were received by the Cook County Bank on January 18, 1875. At that time said bank kept a book containing the individual accounts between the bank and its customers, in which customers were credited with deposits, payments, etc., and were charged with all drafts, checks or payments made to them. Said bank also kept another book, called a "collection register," in which was entered only drafts, notes, bills and checks which were received and taken for collection only, and which were payable at distant points, and for which credit was not to be given to the party remitting the same until the same were actually collected; and all such drafts, notes, bills and checks entered on such register were regarded and treated by said bank as the property of the party remitting the same, the Cook County Bank only acting as agent for the owner for collection. On receiving the said letter and inclosures from appellant, the Cook County Bank at once credited the said other checks and drafts, amounting to \$878.06, on the appellant's account on said first named book. But the said \$5,000 check was entered only on said "collection register," and no credit therefor was entered on appellant's account. And said Cook County Bank did not purchase said check of appellant, or make any advancement in any form whatever to it on account thereof, but simply received the same for collection as agent of appellant. On said 18th day of January, about the hour of 3 P. M., said bank indorsed said check as follows: "Pay J. F. Reeves, Cas., or order, for collection for Cook Co. Nat. Bank, of Chicago. A. West, Cash.," and forwarded the same by mail to the addressee, inclosed in a letter, as follows:

"COOK COUNTY NATIONAL BANK OF CHICAGO,
CHICAGO, ILL., January 18, 1875.

J. F. REEVES, Esq., *Richmond, Ind.*:

"Dear Sir — Herewith we inclose for collection and credit bills as stated below. Respectfully, yours, "A. WEST, *Cashier.*

"Richmond Nat'l, \$5,000."

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About the same hour (3 P. M.) of the same day, the Cook County Bank, being largely insolvent, closed its doors, and never thereafter transacted any banking business ; and on the following morning, possession of said bank, with all its books and assets, was taken by A. Spink, United States Bank Examiner for the Chicago district, who held the same continuously up to February 8, 1875, when the same passed into the hands of a receiver, duly appointed under the United States Banking Laws ; and from and after said January 18, 1875, neither the bank nor any of its officers had any control of the books or assets of said bank ; and up to the time of the trial of this cause, the affairs of said bank were in process of liquidation by such receiver, according to the United States laws, the probability being that it would not be able to pay more than twenty-five cents on the dollar of its indebtedness. The said check, so indorsed and forwarded by said Cook County Bank, was received by the appellee on the morning of January 20, 1875 ; and at about the hour of 10 A. M. of said day, appellee's cashier presented it at the Richmond National Bank, and drew and received thereon the sum of \$5,000. Within an hour or so after paying said check, the cashier of the Richmond National Bank received a telegram from appellant, directing him to refuse payment of said check, which message he at once presented to appellee. Before the presentment and collection of the check, appellee's cashier and teller had notice through newspaper report of the failure and suspension of the Cook County Bank, but said cashier, when he presented the check, did not notify the Richmond National Bank thereof, nor did the officers of said latter bank have any notice of such failure before paying the check. After collecting the check appellee credited the amount on its books to the Cook County Bank, said bank then already being indebted to appellee \$10,450.49, on account of previous dealings, no part of which indebtedness was incurred on the faith or credit of said check, and no consideration was at any time given by appellee for said check, except the giving of said credit on its books, and no communication had passed between appellee and the Cook County Bank in relation to said check, except the letter above set out. At the time of receipt of said check by the Cook County Bank, it was not credited to appellant, and on sending it to appellee, it was not charged to the latter on the books of said bank ; but on January 23, 1875, the appellant was credited and appellee charged with the \$5,000 on such books, such entries however

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being made without the knowledge or assent of appellant, such entries being made only by the order and direction of said bank examiner, who then had such books in his custody. On July 19, 1875, appellant again, by her attorneys, demanded of appellee the proceeds of said check, with the proper interest thereon, payment of which, or any part thereof, was refused, and on the following day appellant commenced this action for the recovery of said money.

We are of opinion, that on these facts the plaintiff was entitled to recover, and therefore that a new trial should have been granted.

The plaintiff held a check, drawn in its favor by Wiggins & Cheesman for \$5,000, on the Richmond National Bank. This check the plaintiff indorsed to the Cook County Bank "for collection for account of First National Bank of Crown Point." This indorsement authorized the Cook County Bank to collect the check for account of the plaintiff.

In the letter transmitting the check to the Cook County Bank, the plaintiff's cashier said: "I inclose for collection and credit as stated below." The check was not transmitted to the Cook County Bank to be collected and applied to the payment of any indebtedness of the plaintiff to that bank. On the contrary, the plaintiff was at the time the creditor of that bank in the sum of nearly fourteen thousand dollars. The direction in the letter meant simply to collect the money for the plaintiff, and instead of remitting the funds, place them to the plaintiff's credit.

The indorsement of the check did not vest the title to it in the Cook County Bank, nor give it any right to the proceeds. In the case of *Sweeney v. Easter*, 1 Wall. 166, Mr. Justice MILLER in pronouncing the opinion of the court, said, speaking of a similar indorsement: "The words 'for collection' evidently had a meaning." That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds."

The letter of the plaintiff transmitting the check to the Cook County Bank did not contemplate that the latter bank should treat the check as its own and credit the plaintiff with the amount of it before collection. If such were the case, it would seem to follow that the plaintiff would lose all remedy upon the check, and be compelled to look solely to the Cook County Bank as its debtor.

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On the other hand, if the acceptance of the check by the Cook County Bank, for the purpose and upon the terms specified in the letter, made it the debtor of the plaintiff for the amount before collection, it was compelled to take the risk of failure to collect.

It is clear that the transaction between the plaintiff and the Cook County Bank did not make the latter bank the debtor of the plaintiff before collection, nor did it deprive the plaintiff of its right to the check or its proceeds before collection by the Cook County Bank. *Scott v. Ocean Bank, etc.*, 23 N. Y. 289; *Levi v. National Bank, etc.*, 5 Dill. 104; *Johnson v. Barney*, 1 Iowa, 531. Nor indeed did the Cook County Bank give the plaintiff credit for the check. On the contrary, it placed it in its "collection register," as a claim received for collection only. What was done after the bank ceased to do business, by the direction of the bank examiner, without the knowledge or consent of the plaintiff, cannot injuriously affect its rights in the premises. The Cook County Bank, then, received the check merely as the agent of the plaintiff for collection, with authority to credit the plaintiff with the proceeds when collected. The Cook County Bank transmitted the check to the defendant for collection, with authority to credit the former with the proceeds when collected. This would, perhaps, in the absence of controlling circumstances, have conferred the right on the defendant to credit the amount when collected to the Cook County Bank, in liquidation *pro tanto* of the debt which that bank owed the defendant.

The defendant must be regarded as the agent of the Cook County Bank in making the collection; and when the defendant collected the money, it would seem that the Cook County Bank should be deemed as having collected it, and therefore authorized to appropriate the money to the payment of the defendant's debt, or otherwise as it might choose, and credit the plaintiff with the amount. But the defendant was fully notified, by the indorsement on the check, that the Cook County Bank was not the owner of it, nor entitled to its proceeds; that that bank was only the agent of the plaintiff for the collection of the check for the account of the plaintiff.

On the 18th of January, 1875, the Cook County Bank became insolvent, closing its doors, and never thereafter transacted any banking business. On the following morning the bank examiner took possession of its books and assets, which finally passed into the hands of a receiver.

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On the 20th of January, 1875, the defendant received the check and drew the money upon it, having notice at the time of the plaintiff's right to the check and its proceeds, and of the condition of the Cook County Bank. The parties filed an agreement as to some of the facts, from which we copy the following paragraph :

“ On the same morning (January 20, 1875), and before the presentment and collection of said check, the defendant's cashier and teller had notice, through newspaper report, of the failure and suspension of the said Cook County National Bank.”

This notice we regard as amply sufficient to put the defendant upon its guard, and to require it to regulate its action with a view to the rights of the plaintiff, as affected by the failure of the Cook County Bank, if indeed it would not be obliged to take notice of the failure of its principal, so far as that failure affected those rights. The Cook County Bank had a power to collect, not coupled with an interest ; for if it had collected the money, the plaintiff might have withdrawn the funds the next moment, and the defendant, being the mere agent of that bank for collection, had no greater right to the paper, as against the plaintiff, than its principal.

The direction in the letter of the plaintiff to the Cook County Bank, to credit the money to the plaintiff, when collected, was an authority to mingle the funds with the general funds of the bank, whereby the plaintiff would become the general creditor of the bank instead of being entitled to the specific fund. If the plaintiff had been the debtor of the Cook County Bank, perhaps the power would have been coupled with such an interest as to make it irrevocable. See cases cited in note *d*, Dunlap's Paley's Agency (4th ed.), top p. 185.

Now we think on principle and authority, that the insolvency and suspension of the Cook County Bank operated as a revocation of the authority contained in the plaintiff's letter, to mingle the fund with the general funds of the bank, so as to make the plaintiff the general creditor of the bank for the amount, instead of being entitled to the specific fund. It may be that the power to collect at all was revoked, but it is unnecessary to express any opinion upon that point. If after the insolvency and suspension of the Cook County Bank, it had the power, by reason of the paper being in its hands, to make the collection, the plaintiff was entitled to the specific fund.

The defendant, as the collecting agent of the Cook County Bank,

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had no more power or right to the specific fund than its principal had. Story Agency, § 469.

It is said by the author last above quoted, at section 486 of the same work, that bankruptcy, "it is said, will amount to a revocation of his" (the agent's) "authority to receive money from the purchaser" (of goods), "or from other persons, upon the account of his principal. By the foreign law also the bankruptcy of the agent operates as a revocation of his authority, for the satisfactory reason, that it is presumed that the confidence of the principal in him is thereby destroyed." The reason above given is forcible when applied to a bank employed as a collecting agent, with power to enter a general credit for the fund when collected, and becoming insolvent and suspending after the employment. See also Ewell's Evans Agency, top p. 122.

In the case of *Audenried v. Betteley*, 8 Allen, 302, it was held that the insolvency of an agent terminated his agency.

The authority of the Cook County Bank to credit the plaintiff with the proceeds of the check, when collected, thus making the fund its own, instead of remitting it to the plaintiff, ought to be considered as revoked by its suspension and failure. If revoked the plaintiff is entitled to the fund. If not revoked, the plaintiff is entitled to only its share in the assets of that bank in common with other creditors; and that bank will be paying the defendant \$5,000 with money derived from the plaintiff without consideration. The view which we take of the question accords with, and is supported by, the case of *Levi v. National Bank, etc.*, *supra*, where a similar question in principle was involved. It follows that the defendant has collected, and has in its hands, money which belongs to the plaintiff. The fact that the defendant has credited the amount on its debt against the Cook County Bank cannot discharge it from liability to the plaintiff. The action will lie to recover the money.

No objection can be successfully made on the ground of want of privity. There is some discrepancy in the decisions as to whether the collecting agent, or the sub-agent, should be sued by the holder of paper, for the failure of the sub-agent to perform some duty, or for some negligence, whereby the debt is lost. See 1 Dan. Neg. Inst., § 344 and notes. But the rule scarcely admits of an exception, that where one has in his hands money which rightfully belongs to another, the latter may sue for and recover it. 2 Chit. Cont. (11th Am. ed.), p. 898, and note *n*; *Hall v. Marston*, 17 Mass. 575.

Woodfill v. Patton.

It is said, in *Morse on Banks and Banking* (2d ed.), p. 418, that "If commercial paper is deposited in a bank for collection, and is by that bank transmitted to any other bank or agent, or through any series of banks or agents, till it reaches the possession of the last bank or agent, whose duty it becomes actually to make the collection, the bank or agent actually making the collection can be held directly by the owner of the paper to pay the amount, less charges and expenses, to him." See also, the case of *Comstock v. Hier*, 73 N. Y. 269; s. c., 29 Am. Rep. 142.

[Minor points omitted.]

Judgment below is reversed with costs and the cause remanded for a new trial.

Reversed and remanded.

WOODFILL v. PATTON.

(76 Ind. 575.)

Will—revocation—"mutilation."

A statute provided that no will shall be revoked unless the testator shall destroy or "mutilate" the same. A testator drew pencil lines across his signature, with intent to revoke, but left the signature still legible. *Held* a "mutilation."*

THE opinion states the case. The defendant had judgment below.

C. A. Corbley and W. S. Friedley, for appellants.

E. R. Wilson and J. F. Bellamy, for appellees.

ELLIOT, C. J. Appellants, by their complaint, affirmed that a will executed by Daniel Woodfill had been revoked; this the appellees by their answers denied. Upon this issue the case was tried. A special finding of facts was made and conclusions of law stated. The case comes to this court upon the exceptions to the conclusions of law stated by the trial court.

The material facts are substantially these: Daniel Woodfill, then

* See note, 25 Am. Rep. 35; *Linnard's Appeal* (93 Penn. St. 313), 30 Am. Rep. 753.

a widower with five children, executed a will on the 2d day of March, 1869, and gave it to his son Clarence for safe keeping. Clarence then lived with his father, on what was called the home farm, which was by the will of his father devised to him. In February, 1872, the testator married Nancy Woodfill, one of the appellants. About the same time he became desirous of regaining exclusive possession of the home farm, and to accomplish this purpose he conveyed to John G. Woodfill the land which the will devised to three of his daughters, and to induce his son Clarence to surrender possession of the home farm, gave him the sum of one thousand dollars received from John G. Woodfill, for the land conveyed to him. The proposition made to and accepted by Clarence, and the facts occurring thereafter, are thus stated in the special finding. The said Daniel Woodfill "proposed to Clarence, as an inducement for him to surrender the possession and use of said premises, to pay him said one thousand dollars in payment of the notes mentioned in the first item of the will, amounting to \$500, and as an advancement of \$500 in part payment of his interest in the estate of his father; that Clarence accepted said offer, received the sum of \$1,000, \$500 in payment of said notes and \$500 as an advancement, surrendered the possession of said farm, delivered up said notes to his father, together with said will and the other papers intrusted to him for safe-keeping, and also gave his father a receipt in these words, to-wit:

" 'JEFFERSON COUNTY, INDIANA, Nov. 5, 1872.

" 'Received of Daniel Woodfill the sum of five hundred dollars in part payment of my interest in the estate of my father, Daniel Woodfill.

(Signed)

" 'C. C. WOODFILL.'

"That said transaction took place about November 5, 1872, and within a day or two afterward said Clarence C. Woodfill removed to the State of Kansas, where he bought land and remained two years; that after said Clarence Woodfill had delivered said will to his father and gone from his presence, to wit, on the same day, he (the father) showed the will to his wife, and that his signature thereto was much blackened by a considerable number of parallel and circular lines and some cross-marks made by a common lead pencil, and drawn over and about said signature; that some of the smaller letters were wholly blackened thereby, but were yet discernible on a close inspection, and the said signature, as a whole, still re-

mained quite perceptible and legible through said pencil marks; that his name in the attesting clause was in a similar condition, and that said pencil marks were so made by the testator with the intention of revoking said will, which fact is found by the court as an inference from the foregoing facts; that after calling the attention of his wife to the condition of his signature thereto, he put said will away with his other papers; that at his death it was found in the aforesaid condition among his valuable papers, and that among the latter were also found the notes paid to Clarence and taken up as aforesaid, but that from each of them his signature had been cut off and removed."

Following the finding we have quoted are statements showing the property owned by the testator at the time of his death, in September, 1876; the admission of the will to probate, and showing also the erasure of the pencil marks by the clerk of the Circuit Court after the will had been probated. The conclusions of law are stated in the following language: "And upon the facts found as aforesaid the court, as conclusions of law, finds that said will was not revoked, and the court therefore, as a matter of law on said facts, finds for the defendants."

[Omitting a question of practice.]

In order that there should be a valid revocation of a will there must be the concurrence of two things, the intention to revoke, and the act manifesting the intention. There is no question in this case as to the existence of the intention to revoke, for it is expressly found to have existed at the time the act, which it is contended worked the revocation, was done. The question therefore is whether the act was such as manifested and effected the intention in a manner authorized by law. There must not only be an act of revocation, but the act must be such as the statute recognizes as a proper manifestation of the intention to revoke. The act will not operate as a revocation, no matter how strongly and unequivocally it may show an intention to revoke, unless it be such an act as the statute prescribes. Upon this point there is entire harmony. *Runkle v. Gates*, 11 Ind. 95; *Woolery v. Woolery*, 48 id. 523; 1 *Jarman Wills* (5th Am. ed.), 287, n.; 1 *Redf. Wills*, 306. There is some diversity of opinion as to the proper construction of statutes prescribing methods of revocation, but it is generally agreed that the statutes shall receive a strict construction, and that the case must be brought clearly within their provis-

ions. Our statute upon this subject is as follows: "No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator or some other person in his presence, and by his direction with intent to revoke, shall destroy, or mutilate the same." 2 R. S. 1876, p. 576. The specific acts, which under former statutes and at common law were essential to a valid revocation, as cancellation, burning and the like, are not required to be shown, although they would doubtless be sufficient under the present statute, if of such a character as to show a mutilation or destruction of the instrument.

It was the rule of the common law prior to the enactment of the statute of 1 Vict., ch. 26, that a deliberate obliteration of the signature operated to revoke the will, if made *animo revocandi*. Since the adoption of that statute, the English courts have held that there must be either a partial or total destruction of the paper or parchment upon which the words of the will are written, or a total obliteration of the words of the instrument. These cases are pressed upon our consideration, and we are earnestly asked to adopt them as our guides. The language of the English statute is not at all similar to ours. It is therein enacted that no will, codicil, or any part thereof shall be revoked in any other manner than in designated cases by operation of law, or by the execution of a new instrument, or "by the burning, tearing, or otherwise destroying the same." Under this statute it has been held that drawing a pen across the signature, or by erasing with ink other parts of the instrument will not operate as a revocation, if the signature or words can still be discerned. In one case the court directed the use of strong glasses in order to ascertain whether there was a complete erasure of the characters used in drafting the will. In other cases it is held that nothing short of a destruction by burning or tearing will be an act of revocation within the statute. These cases are cited in the recent editions of Jarman on Wills and Williams on Executors, and we do not deem it necessary or useful to comment upon them, for the statute upon which they are based is so radically different from ours that they can have no bearing upon the question before us. In *Price v. Powell*, 3 H. & N. 340, POLLOCK, C. B., said that "very little assistance is to be derived from the previous cases in construing the altered expression in the statute," and this we may say of all the English cases based upon the statute of Victoria.

The destruction of a will did not at common law imply a ruin of the paper or parchment on which the words were written. It meant taking from the instrument force and effect. The legal force of a will may be as effectually destroyed by erasures as by the destruction of the paper upon which it is written. Neither words nor sentences can have legal validity in and of themselves; the signature duly attested gives force and vitality to the instrument. It is often said a will speaks from the death of the testator, and it would be strange indeed if a paper from which the signature is designedly taken, either by erasure, obliteration or by manual tearing, for the very purpose of preventing it from speaking, should ever be allowed to speak. We think the erasure of the testator's signature designedly and deliberately made, accompanied of course by the intention to revoke, must be deemed a destruction of the will. It is not necessary that there should be destruction in a literal sense of the fabric upon which the words of the testator are written. It will be sufficient if the legal force of the instrument is divested or extinguished. It is not important what the form or character of the specific act is, provided it be such as takes from the will all force and vitality. The paper is of little or no consequence save as the medium of preserving and expressing the purpose of the testator. If the signature of the maker of a promissory note was intentionally and rightfully erased, no one would hesitate to declare that the note was destroyed, although all else remained intact. If the grantor of a deed should intentionally erase his signature before an estate had vested thereunder, it is clear that the instrument could not be treated as a deed, because the taking from it of an essential part would work its legal destruction. It is however unnecessary to multiply illustrations, for it is plain that the force of a writing may be completely annulled by taking from it some essential and indispensable element of vitality.

If we should adopt appellee's theory, we should be compelled to construe the statute as limiting rather than enlarging the methods of revocation. This we cannot do without violating a familiar rule of construction. The language of the present statute is more general and comprehensive than that of the former. Unlike the English statute it contains no restrictive or particularizing words. The language is, no will shall be revoked unless the testator "shall destroy or mutilate the same," and embraces all acts amounting to a mutilation or destruction, whether the acts are such as former statutes

or common-law rules recognized as effective acts of revocation or not. Neither the term "destroy," nor the term "mutilate," should be given the narrow and restricted meaning for which appellee contends. "Mutilate" means something less than total destruction. Mere mutilation of a will would not of itself take from a will all legal force. A mutilation however which takes from the instrument an element essential to its validity, would have the effect to revoke it. To mutilate, in the sense in which it is generally used by law-writers and by judges, means to render imperfect. We often find courts speaking of "records mutilated by erasures," and "records mutilated by corrupt interlineations." Nor is the use of the word in this sense made by courts and writers of law books alone, for it is often used in the same sense by the authors of literary works. We often encounter such expressions as, "The works of the great Stagirite have come down to us in a mutilated condition;" "The commentator has sadly mutilated Quintilian." Webster, as illustrative of the meaning of the word, quotes from Addison the following: "Among the mutilated poets of antiquity, there is none whose fragments are so beautiful as those of Sappho." Worcester defines the word as follows: "To deprive of some essential part." Among the definitions given by Webster is the following: "To retrench, destroy, or remove a material part of, so as to render imperfect; as to mutilate the poems of Homer or the orations of Cicero."

Purposely taking from a will the signature of the testator deprives it of an essential part and makes it so imperfect as that it loses all legal force and effect. The manner in which the mutilation or destruction is effected is not of controlling importance. If the signature were cut or torn from the paper, if all traces were removed by a chemical preparation, there would be no room for controversy; it would plainly be a mutilation of the will. It cannot be any the less a mutilation if the signature is marked out with pen, pencil, or other implement which erases, cancels or obliterates it.

We are referred to the following passage in a writer of acknowledged ability: "Where a pencil instead of a pen is used the cancellation is not necessarily ineffectual, but is always *prima facie* considered deliberative, and it must be shown that it was intended to be final." 1 Jarman on Wills (5th Am. ed.), 291. It appears in this case that the act was more than merely deliberative. The intention to revoke and the cause from which the intention sprung

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are shown by the fact that the testator's controlling purpose was to regain possession of the home farm. The final character of the act is revealed by the fact that part of the property upon which the will was designed to operate was sold, and that the notes therein otherwise provided for were paid by the testator. The fact that the will was exhibited with the erasures upon it proves that deliberation was at an end. The design to revoke had been formed and executed.

The court erred in overruling appellant's exceptions to the conclusions of law.

Cross errors are assigned which require us to determine the sufficiency of appellant's complaint. The appellees contend that the facts stated in the complaint do not show a revocation of the will. The allegations of the complaint upon this point are as follows: "And the plaintiffs allege that said Daniel Woodfill, while in full life, did revoke said will by obliterating his signature thereto, and by obliterating his name wherever it appeared in the attestation clause thereunder written, thereby mutilating said will with the full intent to revoke the same." If we are right in our conclusion that divesting a will of the framer's signature is a mutilation, then we must adjudge the complaint sufficient. We do so adjudge.

Judgment reversed, with instructions to enter judgment upon the special finding in favor of appellants.

Judgment reversed.

KURTZ V. FRANK.

(76 Ind. 594.)

Marriage — breach of promise — renewal — damages — validity of promise when action accrues.

A renewal of a promise of marriage after breach does not defeat an action for the breach.

Exemplary damages are proper in case of fraud, deceit or seduction.

A man promised to marry a woman in September or October if they could agree and get along and be true to each other, and that if she became pregnant from their intercourse, he would marry her immediately. She became pregnant in July, but he then refused to marry her. *Held*, (1) that the illicit intercourse did not so enter into the consideration as to render the agreement void; (2) that an action for the breach accrued at once.

ACTION for breach of promise of marriage. The opinion states the facts. The plaintiff had judgment below.

J. D. Connor, J. L. Farrar, J. Farrar and S. D. Carpenter, for appellant.

C. Cowgill, C. E. Cowgill and H. B. Shiveley, for appellee.

WOODS, J. Action by the appellee against the appellant for a breach of marriage contract. The suit was commenced in the Wabash Circuit Court, and removed thence, on an application for a change of venue, to Miami county, where there was a verdict and judgment for the plaintiff for three thousand dollars. The questions presented for decision arise upon the motion for a new trial, the overruling of which is assigned as error.

Complaint is made that the court did not comply with the request of the appellant that the instructions to the jury be given in writing, but the record does not show the request. Evidence was given that the defendant tried to persuade the plaintiff to commit an abortion, and this is assigned as a cause for a new trial ; but no exception is shown to have been taken to the introduction of this evidence. It is next insisted that the court erred in refusing to give instructions numbered two, three and four, asked by the appellant.

Instruction number two, so requested after stating hypothetically certain facts and conduct of the parties, concludes by saying : "Then the defendant has complied, as far as he can, with the promise he made the plaintiff, and she cannot recover." Even under the facts stated in the instruction, it was rather a question of fact than of law whether the defendant had complied as far as he could with the contract ; but besides this the defendant offered no evidence in contradiction or modification of that of the plaintiff, of which this instruction ignores pertinent and uncontradicted parts ; and as to the facts stated, it is so far variant from the proof as to justify the court in having refused it as inapplicable to the evidence.

The third of these instructions is to the effect that in order to recover, the plaintiff must have proved that she requested the defendant to marry her before bringing the action. The substance of this was given in another instruction. There was also evidence tending to show an abandonment of his relation as suitor, and a

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renunciation of his promise to the plaintiff; and in such case a request to fulfill the promise is not necessary.

The fourth instruction requested by the appellant was, in substance, that if the defendant went to the plaintiff before the bringing of this suit and offered to marry her, and she refused, she cannot recover.

Refusing this, the court gave an instruction to the effect that if the defendant made such offer to marry the plaintiff within a reasonable time, and without a previous breach of the contract, it would be a defense to the action; but if prior to such offer the contract had been broken, it would not be a defense; that once there has been a complete breach, a subsequent offer to marry will not defeat the right of action. The court committed no error in this respect. In 2 Pars. on Cont. 68, it is said, in manifest accord with the principles of reason and justice: "An offer to renew or execute the contract after a refusal should be no defense." The fact and circumstances of the refusal or breach may often be such as to bar the possibility, or at least the probability, of any happy results from marriage between the parties, and the defendant, in such a case, should not escape the consequences of his willful breach of the engagement by offering to consummate a marriage whose auspices were already beclouded by his bad faith and deceit. See *Southard v. Rexford*, 6 Cow. 254; *Liefman v. Solomon*, 7 Abb. Pr. 409, *n*; *Kelly v. Renfro*, 9 Ala. 325. How far such an offer to renew and perform the broken engagement may go in mitigation of damages, must be left in each case to the jury, or to the court trying the cause.

The jury were instructed that if the contract and the breach of it had been proved, and if from the evidence they believed that the element of fraud and deceit mingled in the controversy as an ingredient in the conduct of the defendant, either in making the contract or in breaking it, they might allow exemplary damages. The abstract correctness of the doctrine so enunciated is not denied, but it is insisted that there was no evidence of fraud or deceit, and that the instruction was therefore inapplicable, and calculated to mislead. Fraud may be inferred from conduct and circumstances, though there be no direct proof; and upon the evidence in this case we cannot say that the court was not justified in submitting the matter to the jury, as it was done in this charge. The seduction of the appellee by the appellant was clearly proved, and the inference may not be said to be entirely unwarranted that

seduction, and not marriage, was the original and persistent design of the defendant. There is no similarity between the proof in this case, and that in the case of *Dryden v. Knowles*, 33 Ind. 148, which the counsel for appellant have cited. That punitive damages may be allowed for breach of promise to marry, see *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 id. 474; s. c., 1 Am. Rep. 561; *Simpson v. Black*, 27 Wis. 206; *Dryden v. Knowles*, *supra*.

The plaintiff testified that the defendant promised to marry her in September or October (1878); that he said he would marry her in the fall, if they could agree and get along, and be true to each other; but if she became pregnant from their intercourse, he would marry her immediately. She did become pregnant, about the middle of July, 1878, and informed the defendant of the fact as soon as aware of it. Upon this evidence it is insisted that the agreement to marry immediately, in case of the plaintiff's pregnancy, is void because immoral, and that aside from this part of the agreement, the defendant had until the first of December within which to fulfill his engagement; and consequently that the suit, begun as it was before that date, was prematurely brought.

It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that if pregnancy resulted, the contract already made should be performed at once. This did not supersede the original agreement, but fixed the time for its performance. *Clark v. Pendleton*, 20 Conn. 495.

We are not prepared to lend judicial sanction and protection to the seducer by declaring that he may escape the obligation of his contract so made on the plea that it is immoral. But if this were otherwise, and if by its terms the contract was not to have been performed until at a time subsequent to the commencement of the suit, yet if before the suit was brought the appellant had renounced the contract, and declared his purpose not to keep it, that constituted a breach, for which the appellee had an immediate right of action. *Burtis v. Thompson*, 42 N. Y. 246; s. c., 1 Am. Rep. 516; *Holloway v. Griffith*, 32 Iowa, 409; s. c., 7 Am. Rep. 208, n; *Frost v. Knight*, L. R., 7 Exch. 111; S. C., 1 Moak's Eng. Rep. 218.

We cannot say that the award of damages was excessive.

Judgment affirmed, with costs.

Wills v. Ross.

WILLS v. ROSS.

(77 Ind. 1.)

Guaranty — notice of acceptance — consideration.

An agreement to guarantee an existing debt, if the creditor will give the debtor a little more time, is valid without describing the debt particularly, and requires no notice of acceptance.*

ACTION on a guaranty. The opinion states the case. The plaintiff had judgment below.

W. Dixon, for appellant.

E. C. Buskirk and *P. W. Bartholomew*, for appellees.

ELLIOTT, C. J. Appellees' complaint alleges that Landers & Wills desired to buy goods of them; that appellant was present at the time; that they refused to give said firm of Landers & Wills credit; that thereupon the appellant promised them, that if they would sell goods to the said firm, "he would be security to them for the payment of the same, and guarantee the payment" of the price of the goods, and that if it was not paid when due, he, the appellant, would pay it; that relying solely upon the promise of appellant, and on his credit, they "sold and delivered the bill of goods to the said appellant for Landers & Wills;" that when the money for the goods became due, appellees wrote to appellant notifying him that the bill had not been paid, and demanding payment; that in answer to their letter appellant wrote as follows:

"ELIZABETHTOWN, IND., August 20, 1879.

"Messrs. Ross & Co., Indianapolis:

"GENTLEMEN—Yours at hand, and contents noted. Give John a little more time, and I will see that you get your money.

"Yours respectfully,

(Signed) "P. E. WILLS."

It is further alleged that the John mentioned in the letter is John Wills, a member of the firm of Landers & Wills; that rely-

* See *Thompson v. Glover* (78 Ky. 126), 39 Am. Rep. 230, and note.

ing solely upon Peter E. Wills' written promise contained in said letter, and in consideration thereof, appellees granted said Peter E. Wills and said Landers & Wills an extension of six months' time; that Landers & Wills are wholly insolvent, and that payment has often been demanded of appellant, and refused.

The appeal brings before us the sufficiency of this complaint. If it were clear that the goods were sold to Peter E. Wills, and credit given exclusively to him, then the contract would be an original one, and not within the statute of frauds. *Johnson v. Hoover*, 72 Ind. 395. This however is not clear. It is not easy to determine what meaning and effect should be given to the complaint, for its allegations are not only obscure and confused, but they are also contradictory. Thus it is in one place averred that "the firm of Landers & Wills bought of appellees the bill of goods;" in another that "appellant promised them that if they would sell and deliver to John Wills said goods on credit he would be security for the payment of the same, and guarantee the payment of said debt when due, and if said debt was not paid when due, he would pay the same;" and in still another place, that "relying solely upon the promise of the appellant, and on his credit, they sold and delivered the goods to him for the said Landers & Wills." The only reasonable construction which can be given these inharmonious allegations is, that the goods were sold to Landers & Wills, and payment guaranteed by the appellant. In other words, Landers & Wills are the principal debtors and appellant their guarantor. A case, such as that made by the complaint, is clearly within the statute, unless taken out by the written promise contained in the letter written on the 20th of August. The credit was given to the firm of Landers & Wills as the purchasers of the goods, and the undertaking of appellant was therefore not an original one. The case is not within the rule laid down in *Anderson v. Spence*, 72 Ind. 315; s. c., 37 Am. Rep. 162. In the present case the purchasers, Landers & Wills, were liable to the appellees, and this alone deprives the appellant's undertaking of the character of an original contract. Wherever the parties for whom the third person undertakes are liable to the promisee, the case is within the statute: "If any credit at all be given to the third party the defendant's promise is required to be in writing as collateral. And the rule applies equally, where there is already an existing liability of the principal, and the evidence shows that

the plaintiff by accepting the defendant as surety does not release his claim upon the principal. All the cases show that it does not matter upon which of the two parties the plaintiff principally depends for payment, so long as the third party is at all liable to him to do the same thing which the defendant has engaged to do." Browne Stat. Frauds, § 197.

We proceed to consider whether the promise contained in appellant's letter is sufficient to create a liability against him, in favor of the appellees. The letter is of course to be taken in connection with the other allegations of the complaint, and its effect, when thus considered, must be deemed decisive of the question of the sufficiency of the complaint. The general rule undoubtedly is, that a mere proposal to guarantee the payment of a debt is not obligatory. There must be a proposal and an acceptance. In the present case the complaint does aver that the proposition was accepted, and six months further time given to the principal debtor. The complaint does not allege that notice was given to the party proposing to become the guarantor, or that the appellees had acted upon the statements contained in his letter, and we are therefore required to decide whether notice is essential in such a case as the present. It must be kept in mind that the complaint shows that the debt had already been created; that prior to its creation the appellants had orally promised to pay it in case Landers & Wills did not. There was an existing obligation, fully known to the appellant at the time the letter was written, and the written undertaking was, in truth, a mere renewal of the oral guaranty previously given. There is a well-recognized and plainly-marked distinction between cases where the proposal is to guarantee the payment of a liability existing at the time and known to the guarantor, and those where the proposal is to guarantee the payment of a debt not incurred, and the character and amount of which are not known to the guarantor. In the first class of cases, no notice of acceptance is required, for the guaranty becomes at once effective and operative. It is said by the author of a recent work upon this subject, that "The rule seems to be that if the guaranty is absolute in terms, definite as to amount and extent, notice is dispensed with." Baylies Sureties and Guarantors, § 195.

Another author thus states the rule: "When one directly binds himself to be responsible for another's contract already made, and

of which he has knowledge when he signs, no notice of the acceptance of the guaranty is necessary." Brandt Suretyship, 164.

This doctrine is recognized by our own decisions. In *Milroy v. Quinn*, 69 Ind. 406 ; s. c., 35 Am. Rep. 227, it was said : " But the rule seems to be settled, that when the guaranty is direct, and the thing guaranteed definite in its amount, * * neither notice of the acceptance of the guaranty, nor of the default of his principal, need to be given to the guarantor ; for he knew when he made the guaranty the full extent of his liability." The later case of *Kline v. Raymond*, 70 Ind. 271, enforces the same doctrine, and gives approval to the cases of *Frash v. Polk*, 67 Ind. 55, and *Taylor v. Taylor*, 64 id. 356.

The question before us was exhaustively considered by the Supreme Court of the United States, in the very recent case of *Davis v. Wells*, reported in 13 Cent. L. J. 449, and many of the English and American cases are reviewed. It was said in the opinion delivered in that case : " But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance of the principal debtor passing directly from the guarantee to the guarantor. * * * In both of these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement."

The rule, that where the guarantor's undertaking is to pay an existing debt, of a definite and known character, no notice of assent is necessary, is conclusively settled by the authorities to which we have referred, and cannot be regarded as an open question.

The promise of the appellant made at the time the goods were sold was voidable, and not void. The statute of frauds does not invalidate a parol contract. In *Owens v. Lewis*, 46 Ind. 488 ; s. c., 15 Am. Rep. 295, this familiar doctrine was thus expressed : " A contract that is required to be in writing by the statute of frauds is not invalid if made by parol. ' The statute only inhibits all actions brought to enforce it.' *Hadden v. Johnson*, 7 Ind. 394." Browne Stat. Frauds, 118 ; *Crosby v. Wadsworth*, 6 East, 602 ; *Mather v. Scoles*, 35 Ind. 1.

The promise contained in appellant's letter might well be rested upon the consideration arising from his obligation to perform his original promise. In saying this we do not mean to question the now familiar rule, that " An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might

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have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." *Wennall v. Adney*, 3 B. & P. 247; *Wiggins v. Keizer*, 6 Ind. 252.

We do not mean to say that there are not well-defined and well-recognized exceptions to the general rule, that what is called, although inaptly, a moral obligation, will not support a contract, and that this case is not fully within the exception. It is within the exception, for the reason that the original verbal promise was not void, and did rest on a valuable consideration. It is within the exception because the promise could have been enforced but for the barrier erected by a positive statute. It is within the exception; for the statute of frauds affects not the contract but the evidence only. *Browne Stat. Frauds*, § 115a.

In speaking of the rule that a moral consideration will not support a contract, one of our standard text-writers says: "A qualification to this rule however obtains in cases where there was originally a sufficient valuable consideration upon which an action could have been sustained, but where in consequence of some statute or positive rule growing out of general principles of public policy, the right of action is suspended, and the party is exempted from legal liability." After stating some of the cases which fall within the exception to the general rule, the author proceeds thus: "The ground upon which these exceptions are founded is that these contracts being merely voidable and not void in their inception, they may be revived by a subsequent promise, provided they were originally founded upon an express or implied request by the party benefited." *Story Cont.*, §§ 591, 593.

The doctrine stated by the author quoted is abundantly sustained by the adjudged cases, and by the elementary writers. 1 *Pars. Cont.* 434, n. Some of the cases speak of such a consideration as an equitable obligation, and this is the more appropriate term: it better expresses the nature of the consideration than does the term "moral obligation." Whatever may be the correct name, the principle is a sound and well-recognized one. It is the principle which underlies and supports the cases holding that debts barred by the statute of limitations, by discharges under bankruptcy or insolvent acts may be revived. *Shockey v. Mills*, 71 Ind.

288; s. c., 36 Am. Rep. 196; *Rogers v. Stephens*, 2 T. R. 713. Upon it are bottomed those cases which hold that a verbal contract creates such an obligation as will support a conveyance made by an insolvent debtor against creditors who attack it upon the ground of fraud. *Sackett v. Spencer*, 65 Penn. St. 89; *Livermore v. Northrup*, 44 N. Y. 107; *Hyde v. Chapman*, 33 Wis. 391; *Goff v. Rogers*, 71 Ind. 459; *Brown v. Rawlings*, 72 id. 505. To a much greater length is this doctrine carried in *Flight v. Reed*, 1 Hurl. & C. 702, wherein it is held that a subsequent promise to pay a debt absolutely void under the statute against usury, in force when it was contracted, may be supported upon the original consideration. Chief Baron POLLOCK there referred to the term "moral obligation" in this language: "Such a consideration has been sometimes called a moral consideration. And we think unfortunately so; for the term used as a definition tends to include too wide a range of objects." The decision of Baron PARKE in *Earle v. Oliver*, 2 Exch. 71, is approvingly quoted. In the case last mentioned it was said: "The principle of the rule laid down by Lord MANSFIELD is, that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." The provision, that contracts of guaranty shall be in writing, is one for the benefit of the guarantor, and he may therefore renounce it, and bind himself by a subsequent written contract. In truth, he was already bound; the statute neither makes nor unmakes such a contract. The question we have in hand is not altogether barren of authority. It is said by an English author, in speaking of the general rule, that a mere moral consideration is not sufficient: "So, again, a contract which, for want of written evidence required by statute, cannot be sued upon, may be revived by express promise, provided the statute did not render the contract absolutely void for want of written evidence." De Golyar Guaranties, 37. The only adjudicated case directly in point, which we have seen, is that of *Wilson v. Marshall*, 15 Ir. C. L. 466, where it was held that the original valuable consideration formed a sufficient one for the subsequent contract. In delivering the opinion of the court, the chief justice declared that the case came clearly within the rule in *Wennall v.*

Adney, supra. The language of the learned chief justice was: "It appears to me this case comes within that rule. Here, there was clearly a legal liability on the part of the defendant under his guaranty, which the statute of frauds did not vacate or annul, but rendered it incapable of being enforced for want of legal evidence."

In Chitty on Contracts it is said: "A promise to pay a debt already incurred by a third person is not available unless it be made on a new consideration, such as forbearance; but if the credit were originally given to the third person at the promisor's request, this might constitute a sufficient consideration for his subsequent guaranty." 11th Am. ed. 62. As the sale of the goods was in the first instance made upon the promise of the appellant to pay for them, and this, too, after credit had been refused, as he knew, to the principal debtors, his subsequent written promise may be equitably and justly deemed to be supported by the obligation arising out of the consideration of his previous verbal promise. Moreover, there was the further consideration of forbearance. The consideration is not to be extracted from one part of the transaction; the entire business affair between the parties is to be taken into account, for the purpose of ascertaining whether the contract of guaranty is supported by a consideration. The consideration expressed in the letter is however of itself sufficient to support the contract. The rule is thus laid down: "An agreement on the part of the creditor for general indulgence toward the principal, without any definite time being specified, with proof of actual forbearance for a reasonable time, is sufficient." Brandt Suretyship, § 8. Another author uses this language: "It appears also to be the better opinion that such postponement need not be for a specific length of time, but that an agreement to postpone indefinitely, with proof of actual forbearance for a reasonable term, will be sufficient." Browne Stat. Frauds, § 190; 1 Pars. Cont. 442; 1 Chit. Cont. (11th Am. ed.) 36, *n.* The English decisions have been somewhat conflicting. In *Oldershaw v. King*, 2 H. & N. 399, it was decided, POLLOCK, C. B., dissenting, that where no time was stated, the consideration of forbearance was not sufficient, but upon appeal this decision was reversed. COCKBURN, C. J., and ERLE, WILLIAMS, CROMPTON and WILLES, JJ., all giving opinions upon the question. *Oldershaw v. King*, 2 H. & N. 517. The Supreme Court of Vermont, in passing upon a question similar to that before

us, said: "It is further said, that inasmuch as there is no particular time stipulated for the forbearance, the instrument is void for want of consideration. This objection is untenable. 'If no agreement be made as to the length of time during which the promisee will forbear, the law will presume that he undertakes to forbear for a reasonable time; and this is sufficiently certain and is a good consideration.'" *Hakes v. Hotchkiss*, 23 Vt. 231. This fully harmonizes with the principle so often approved and applied, that where parties stipulate for the performance of an act, but do not designate the time within which it shall be done, the law will presume that a reasonable time was intended.

There is an obvious distinction between the case of a guarantor seeking to avoid liability because of the insufficiency of consideration, and the case of a surety claiming a release because of the extension of time to the principal. In the one case, the question is solely as to the adequacy of the consideration. In the other, the question is whether the creditor has fettered himself by a contract of forbearance. There are sound reasons for holding, in the latter case, that the time must be definite. If indefinite, the creditor may sue at once. If definite, he cannot sue until the expiration of the extension, as some of the cases hold; if as other cases hold, he may sue, he cannot sue without incurring the hazard of an action for damages for breach of the contract of forbearance, and his freedom of action is thus hampered, to the prejudice of the surety. These reasons have not a feather's weight where the question is as to the adequacy of the consideration of the contract of guaranty.

The complaint shows that the debt guaranteed in the appellant's letter is the one upon which the action is founded. The circumstances of the original purchase, the letter of appellees to him, and his reply, must be taken as parts of one cause of action, and thus taken, show with sufficient certainty that the debt of which appellant guaranteed payment is that described in the complaint. It is not essential that the debt should be described with minute particularity. Contracts of guaranty, like all other contracts, are to be read "by the light of surrounding circumstances." *Belloni v. Freeborn*, 63 N. Y. 383; *Lawrence v. McCalmont*, 2 How. 426; *Union Bank v. Coster's Ex'rs*, 3 N. Y. 203.

Judgment affirmed.

Petition for a rehearing denied.

WHITE V. FISHER.

(77 Ind. 65.)

Notice—of lien—constructive.

Defendant drew a deed, and as notary public took the acknowledgment of its execution, and also drew notes, executed by the grantee for the unpaid purchase-money. Four years afterward he bought the premises. *Held*, that he was not chargeable by these facts with notice of the vendor's claim and lien for unpaid purchase money.*

ACTION on promissory note and to enforce vendor's lien. The head-note and opinion show the facts. The plaintiff had judgment below.

J. A. McNutt, for appellant.

W. M. Franklin, B. E. Rhodes and C. F. McNutt, for appellee.

Howk, J. In this action the appellee sued the appellant and one George W. Sherrell, in a complaint of two paragraphs, to collect the amount due on a certain promissory note for \$1,500.54, executed by the said Sherrell and payable to the appellee, in consideration of the conveyance by the latter to the former of certain real estate in Owen county, Indiana, and to enforce an alleged vendor's lien on said real estate, then owned by the appellant. After the cause had been put at issue, it was tried by the court, and at the request of the parties, the court made a special finding of the facts and of its conclusions of law thereon, in substance, as follows:

[Omitting these.]

The question for decision, as it seems to us, is this: Was the appellant, at the time he purchased the land in controversy from Sherrell, chargeable with notice of the appellee's claim against Sherrell for unpaid purchase-money, by reason of the facts found by the court on that subject? The only facts thus found by the court were in substance as follows: At the time of the appellee's sale and conveyance of the land to Sherrell, on the 28th day

* See *Vest v. Michte* (31 Gratt. 149), 31 Am. Rep. 722; *Fairfield Sav. Bk. v. Chase* (72 Me. 206), 30 Am. Rep. 319, and note.

of January, 1868, the appellant was called upon, as a notary public, and drew the notes given for unpaid purchase-money, and also drew and took the acknowledgment of the deed for the land; and he, the appellant, included in the notes a description of the land, then advising the parties that that would make them as good as a mortgage; and there were two notes, payable respectively in one and two years from date. The court expressly found that the appellant had no other notice of appellee's claim for unpaid purchase-money than the notice, if such it is, set forth and contained in the last recited facts.

It will be observed that the court did not find that the appellant, at the time of his purchase of the land in controversy from Sherrell, had actual notice or knowledge of the appellee's claim thereon for unpaid purchase-money; but the court must have rested its conclusions of law and judgment, as against the appellant, upon the fact found, that the latter, nearly four years before his purchase of the land, as a notary public, had drawn the notes given by Sherrell for unpaid purchase-money of the land to the appellee. We are of the opinion that the facts found by the court, in relation to the transaction between Sherrell and the appellee, and the appellant's connection therewith, were not sufficient to charge him, the appellant, at the time of his purchase of the land, with notice of the appellee's claim against Sherrell for unpaid purchase-money. The appellant's purchase of the land was an entirely different transaction from the one in which he had been called upon, merely as a notary public, to draft the deed and take its acknowledgment, and write the notes given for unpaid purchase-money. There is no presumption, either of law or fact, that at the time he purchased the land, the appellant remembered the details of the previous transaction, in which he had acted as a notary, between said Sherrell and the appellee. Still less can it be presumed, from the facts found by the court, that the appellant, at the time of his purchase of the land, had any notice, either actual or constructive, that the two notes so drawn by him in the former transaction, both of which were long past due, as he had drawn them, were then unpaid and outstanding, in whole or in part.

In 2 Sugden on Vendors (8th Am. ed.), bottom p. 755, it is said that the purchaser of land will not be bound by notice in a previous transaction, "which he may have forgotten;" and again it is said by the same learned author, that "the notice to the purchaser

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must be in the same transaction." And the same author further says: "To constitute a binding notice, it must be given by a person interested in the property, and in the course of a treaty for the purchase." In the American note to the leading case of *Le Neve v. Le Neve*, in 2 W. & T. Lead. Cas. 144, *et seq.*, the authorities on the subject now under consideration are carefully collated and compared, and an attempt is made to harmonize the various decisions of the courts of last resort, especially in this country, and to deduce therefrom some general rules on the question of notice. It is there said: "Notice may be either actual or constructive. It is actual when the purchaser is aware of the adverse claim or title, or has such information as would lead to knowledge. * * * Constructive notice is a legal inference of notice of so high a nature as to be conclusive unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice and believed the vendor's title to be good." These definitions of the two kinds of notice seem to be well sustained by the numerous cases cited by the American annotators.

In the case at bar, our conclusion is that the appellant, at the time of his purchase of the land, was not chargeable with notice, either actual or constructive, of the appellee's claim against Sherrell for unpaid purchase-money, by reason of the facts found by the court on that subject. The court erred, we think, in its conclusions at law, as between the appellant and the appellee.

The judgment against the appellant, and in favor of the appellee, is reversed, at the appellee's costs, and the cause is remanded with instructions to modify its special finding of facts and conclusions of law in accordance with this opinion, and render judgment accordingly in the appellant's favor, and against the appellee.

JUDY V. GILBERT.

(77 Ind. 96.)

Will — parol evidence to correct.

The plaintiff's complaint stated in substance that the testator had borrowed money of his wife, to buy the "north-east quarter of the south-east quarter" of a section of land, agreeing to devise the land to her for life with remainder to her children; that he executed his will, intending to conform to

that agreement, but by mistake the will described the land as the "north-east quarter of the south-west quarter," and that he owned no such land, and no other land than the lot misdescribed. *Held*, that parol evidence of such facts was inadmissible. (*See note, p. 292.*)

THE opinion states the case.

G. M. McDonald, G. A. Cutting and Mr. Ballou, for appellants.

J. D. Ferrall, for appellee.

ELLIOTT, C. J. A single error is alleged and that is assigned upon the ruling sustaining appellee's demurrer to the complaint of the appellants. The material facts stated as the cause of action may be thus summarized : John Hall desired to buy a certain tract of land described as "the north-east quarter of the south-east quarter of section 29, township 37 north, of range 11 east, situate in Lagrange county, Indiana." He borrowed money from his wife to buy the land, and promised her that if she would lend him the money he would devise the land to her for life and remainder in fee to her children ; that in September, 1843, the testator was the owner of the land above described and of no other ; that pursuant to his agreement with his wife, he made his will, intending to devise to her the said land ; that by mistake of the draftsman employed to prepare the will, the land was wrongly described as "north-east quarter of the south-west quarter of section 29, in township 37 ;" that the testator did not then own, nor did he at any time own, the land described in the will ; that the widow of the testator took possession of the said north-east quarter of the south-east quarter of section 29, township 37, range 11 east, under the will ; that she remained in possession until her death.

The appellants insist that the will conferred title upon the widow during life and remainder in fee to her children. This general position is based upon these propositions :

First. That a will must be construed so as to carry into effect the intention of the testator, and that it is clear that the testator intended to devise the land of which the widow took possession to her.

Second. That as the testator owned but one tract of land, and as the only error in the description consisted in writing the word

"west" after the word "south," instead of the word "east," the misdescription should be corrected.

Of these in their order :

First. It is undoubtedly true that the intention of the testator must govern, but this intention must be gathered from the will itself. Parol evidence cannot be used to add to, or to take from the will. The instrument may be read by the light of surrounding circumstances, but its legal meaning and effect cannot be varied by parol evidence. This is a cardinal principle, and is in truth a rule without an exception. To permit evidence of the character insisted upon by appellants to control the plain and unambiguous words of the will would be a direct violation of this elementary rule.

Second. Mistakes not apparent on the face of the will cannot be corrected by the court. Courts must construe and enforce wills as they are written. To undertake to correct mistakes upon extrinsic evidence would be to supply the place of written instruments with verbal statements, and would often result in the court's making the will instead of the testator. The position of appellant's counsel is that the will should be treated, not as devising the land actually described therein, but as devising land of which the testator died the owner. In support of this position, counsel cite the case of *Cleveland v. Spilman*, 25 Ind. 95. In that case the language of the testator was, "my land, being the south half of the north-east quarter of section 36, township 3 south, of range 12 east, I do * bequeath to my wife, Eliza." The court, in its opinion in that case, placed great stress upon the clause, "my land," and very properly, for these words were of themselves sufficient to carry the land then owned by the testator. The attempt to specifically describe the land did not make nugatory the general description. There was in the case cited no need of looking beyond the will, for the language used by the testator furnished all the needed information of the testator's intention. In *McAlister v. Butterfield*, 31 Ind. 25, the court held that mistakes in a will cannot be corrected by the courts except in cases where the mistake is apparent upon the face of the will itself. The earlier case of *Judy v. Williams*, 2 Ind. 449, declares and enforces the same principle, and in the case of *Grimes' Ex'rs v. Harmon*, 35 id. 198; s. c., 9 Am. Rep. 690, the court approved the doctrine of the earlier cases. In the case last cited the court quoted, with approval, from the opinion in *Jackson v. Payne's Ex'rs*, 2 Metc. (Ky.) 567, the fol-

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lowing: "The doctrine in regard to mistakes in wills is that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, and must be such as may be made out by a proper construction of its terms, otherwise there can be no relief." In the case of *Bunnell v. Bunnell*, 73 Ind. 163, the doctrine of the cases cited was again approved.

The rule recognized by our cases is an old one and is well supported by both the ancient and modern authorities. Lord COKE in *Cheyney's* case, 5 Rep. 68, said: "In a devise of land by writing an averment out of the will should not be received. For a will concerning land ought to be in writing and not by any averment of the same, otherwise it were a great inconvenience that not any may know by the written words of the will what construction to make, if it might be controlled by collateral averment out of the will." The cases cited by appellant holding a different doctrine from that approved by us we think wrong in principle, and in conflict with authority. Among the later cases holding the same doctrine as that of this court may be cited *Bishop v. Morgan*, 82 Ill. 351; s. c., 25 Am. Rep. 327; *Kurtz v. Hibner*, 55 Ill. 514; s. c., 8 Am. Rep. 665; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; s. c., 14 Am. Rep. 538; *Reynolds v. Robinson*, 82 N. Y. 103; s. c., 37 Am. Rep. 555; *Griscom v. Evens*, 11 Vroom, 402; 13 id. 579; s. c., 29 Am. Rep. 251.

There is no mistake here upon the face of the will which is here the subject of investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The court is asked to admit parol evidence to show that although the testator described with perfect accuracy one parcel of land he meant another. The bare statement of appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence.

[Minor consideration omitted.]

Judgment affirmed at costs of appellant.

Judgment affirmed.

WOODS, J., absent.

NOTE BY THE REPORTER.—See *Sherwood v. Sherwood*, 45 Wis. 357; s. c., 30 Am. Rep. 757.

In *Morrell v. Morrell*, 7 P. Div. 68, the testator had instructed the draftsman that he wished to give his 400 shares of B. stock to his nephews, but the draftsman inserted the

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word "forty" instead, and the will was so executed without being read over to the testator, and without his knowing of the substitution. The jury having found that this was done by mistake, the court ordered the word "forty" struck out.

In *Patch v. White*, Supreme Court, District of Columbia, April, 1882, the devise was of "lot 6, in square 403." The testator did not own that lot, but he owned lot 8, in the square 406. Held, that parol evidence of that fact was inadmissible to effect the substitution in an ejectment suit. The court said, by HAGNER, J., JAMES, J., concurring:

"The answer therefore to the question above proposed — enjoined as well as sanctioned by the general principle above mentioned — must be, that any evidence is admissible, which, in its nature and effect, merely explained what the testator has written; but no evidence can be admissible, which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written."

"The case of *Walston v. White*, 5 Md. 297, was a case of a devise of lands, which were described as being 'on the south side of Beaver Dam Branch,' and the court says: 'The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of the words,' and they admitted evidence to show the true location of the branch. The principle is confirmed, almost in the same words, in the case of *Hammond v. Hammond*, 55 Md. 573. But indeed there is a perfect flood of cases, and multitudes were cited in the argument. We think however that the decision of the courts in the principal cases would not admit such testimony as is sought to be introduced here. Of citing cases there is no end, but it is to be observed that many of them are early cases before the statute, and are therefore not reliable. Such is the opinion of Redfield, Jarman, and other text-book writers; and among those cited as being before the statute are the cases from Ambler and from Coke's reports. All these are therefore, not safe guides, because unquestionably the statute was intended to prevent the latitude of evidence which had hitherto prevailed. On page 115 (margin) of Wigram, it is said: 'The principle, if any, upon which the excepted cases, taking them collectively, are founded, is by no means obvious;' and further down, on page 114, he says: 'How can the statute, which makes a writing indispensable, be satisfied, if the thing which is the subject of disposition, or the person who claims the benefit of it is not described in that writing with certainty sufficient to enable the court, by the description in the writing, to determine their identity?' In the case of *Beaumont v. Fell*, 2 P. Wms. 141, the master of the rolls, although he admitted the parol evidence, said: 'If this had been a grant — nay, had it been a devise — of land, in equity, where 'the conscience of the heir may be affected,' in the language of the courts, 'if he shall insist upon the literal interpretation of a devise against the meaning well known to himself to have been intended by the testator,' naturally, under such circumstances, a court of equity might be more inclined to consider the offer of such evidence than a court of law in a dry legal action like an ejectment, which is governed by technical rules. By the statute of Maryland of 1796, ch. 101, all devises of any land, etc., shall be in writing, signed by the party devising the same, or by some other person in his presence, and by his express direction, and attested and subscribed to in the presence of the testator by three or four credible witnesses, or else it shall be utterly void, and of none effect. This clause is a literal transcript of the provision in the Statute of Frauds and Perjuries, 29 Charles II, ch. 3. Now what was the state of the law before this statute? In Wigram on Wills, page 5 (author's edition), it is thus laid down: "It was holden before the statute that parol evidence was, in certain cases, admissible to determine the person or thing intended, where the description in the instrument was insufficient for that purpose; as in a devise to A. B., where there were two persons of the same name, or a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale, in which cases parol evidence of witnesses who spoke to the testator's intention was admissible to determine which of the two persons named respectively A. B. or which of the manors of Dale was intended by the testator. That is to say, where the identity of the person or thing intended by the testator has been the only point in dispute, and the description in the will has been insufficient to determine it.' And, further down, he says: 'The courts have uniformly professed to be governed by the admitted principle, that the judgment of a court in expounding a will should be merely declaratory of what is in the instrument. This was the general rule at common law, before the statute, and if the statute has not

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strengthened its obligations, it certainly has not relaxed them,' and as to the effect of the statute, the author states that it, 'by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and in effect makes the writing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing, which is as much as to say that all that is effectual to the purpose must be in writing, without it had been void by reason of the mistake both of the Christian and surname; but where is the distinction between a grant and a devise of land for the purpose under consideration?' This case was one where 'Gertrude Yardley' was held entitled to a legacy which was given by the will to 'Catherine Earnley.' Again, on page 130, Wigram says: 'The decisions then in the excepted cases must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determinate principle. They appear to be decisions in which the general principle has been sacrificed to meet the hardship of particular cases.' One of the principal cases involving the admission of parol testimony to explain what the testator meant is the celebrated case of *Goblet v. Beechey*, 3 Sim. 24. It is well known that the origin of Mr. Wigram's book was in his criticisms on that case, where the master of the rolls allowed parol evidence to explain what was meant by a provision in the will. This ruling however was reversed by Lord Chancellor Brougham. After the decision in *Goblet v. Beechey*, came the case of *Müller v. Travers*, 8 Bing. 244. In that case the testator devised in a particular way all his estates in the county of Limerick and the city of Limerick. It appeared that the testator possessed estates in the city of Limerick, but none in the county, but that he had large possessions in the county of Clare, and the offer was made to prove, that in the original draft of his will, the devise had been of all his lands in the county of Clare and the city of Limerick, and that by a blunder of the scrivener, the county of Limerick had been inserted for the county of Clare. This case was heard on appeal by Lord Lyndhurst and Lord Chief Justice Tindal, among other judges, and their opinions were delivered at great length, and after mature examination, and it was there held unanimously by the judges that such evidence was inadmissible. In 18 Howard (see also 11 Wharton), in the case of *Watkins v. Allen*, this case of *Müller v. Travers* is adopted by the Supreme Court of the United States as expressing the correct position on the subject. The testator in the present case does not say that his property was in the city of Washington, and it cannot be doubted that parol evidence to that extent would be admissible by way of identifying the property named by him in the will, but the argument is that we can go further than this, and correct the numbers as given for square and lot.

"Now the applicable cases seem to be confined to instances of what Lord Bacon calls 'equivocation' in a will, recognizing the principle as laid down by him that parol evidence was admissible 'where the persons or things may be equally designated by the same description,' or where there is a description plain enough as to one part in the will and equivocal as to the other, the equivocal part may be rejected if enough remains to let us see what the testator really intended to express, or portions of the description may be rejected, provided there is something left certain, as if a man, on writing his will on the back of a deed, should say, 'I give the piece of land conveyed to me by the within deed containing 100 acres, lying in the county of Dale,' etc., he may have the number of acres wrong, he may have the county wrong, and he may have the position wrong, and the name may be incorrect, and yet such a devise may be sustained, because a sufficient description of the property intended is evinced by his declaration that it is the property conveyed by the deed that is pointed out in the will - in other words, one thing may be incorrect, and be corrected by another, if there is any thing to correct it by. In the case of *Watkins v. Allen*, 18 How. 385, the whole matter is decided on the strength of this English decision.

"Now applying these principles here, what can we do with the devise of this lot? The will says, 'lot 6, in square 403,' and it is said that ought to be read lot 3, in square 406. The first thing to do then is to strike out the number of the lot, and then to strike out the number of the square. What then remains? Nothing on earth but these 'improvements.' It is manifest that this will was not drawn by a lawyer; it jumbles 'improvements' and appurtenances together, and leaves out words of limitation, and makes other blunders all the way through, and to admit parol testimony to give effect to the

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blunders of this man is to do the very thing which the statute was designed to prevent. The recent important cases seem to be within the principle I have just enunciated. For instance, a New Hampshire case; where the property was described wrongly, but was identified as the 'piece I bought of A.,' a case reported in 2 Washington's Reports, where 'a lot on Fourth street, in the occupation of A. and B.' was held to pass a lot on Third street in the occupation of the persons named; a case in Indiana where the north-east quarter of a township was devised, and the north-west quarter was held to pass, the rest of the description being there sufficient; the case in 20 Missouri, on page 230, where the sections devised were right, but the township wrong, and the property was identified in the will by its accessibility to the 'Big Spring;' the case of *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; s. c., 14 Am. Rep. 638, where the testatrix devised the west half of the north-east quarter, which she did not own, instead of the east half of the south-west quarter, which was her property, and where the plaintiff offered proof that a similar mistake to that insisted on in the case of *Miller v. Travers* had occurred, and to prove by the scrivener that the description originally given to him was the correct one, but the offer of parol proof was rejected. In the case of *Wetheres's Lessee v. Bancoville*, the circumstances were quite touching. A settler in the far west, killed by Indians, while dying had at the door of his cabin dictated his will to a neighbor; it happened, that possibly through want of familiarity with the subject, the scrivener incorrectly recited the instructions of the testator, and this fact was evident that the heirs for many years had held the property among themselves according to the verbal directions of the testator, and against the written devises in the will. When however a claim was made under the language of the will, the Supreme Court held that parol evidence of what the testator directed the scrivener to write was inadmissible, and that the devises, as expressed in the will, were conclusive upon the rights of the parties. It results in the language of the court in the case of *Jackson v. Van Vechten*, in 11 Johns, 201, that 'in cases of this kind, where there is no sufficient description in the will, independent of that which is false, the devise fails for uncertainty. It would be impossible for counsel ever to advise with confidence as to a title derived under a will, if as in the present instance, after the expiration of nearly fifty years, it is admissible by parol evidence to prove that a devise of property distinctly described in the will was in fact a devise of another portion not named in the will, and differing in location, and in all other points of description, and if under the sanction of this statute of frauds, such evidence is to be admitted, we may well, in the language of an English judge, say that its title should be changed, and that it should be called 'an act for the promotion of fraud, and the encouragement of perjuries.'" The chief justice dissented.

MASONIC MUTUAL BENEFIT ASSOCIATION v. BECK.

(77 Ind. 208.)

Insurance — condition — waiver — evidence — confidential information — physician.

The demand and receipt of assessments by a life insurance company, after the death of the insured, with knowledge of his death, and that the contract was voidable on account of misrepresentations by the insured, waives the forfeiture.

A physician may not testify, to the injury of his patient or his representatives, to facts which he learned concerning the patient's ailments either by the patient's statements or by his own examination and observation.*

* See *Campau v. North* (30 Mich. 606), 33 Am Rep 438, and note, 436.

ACTION on a life insurance policy. The opinion states the facts. The plaintiff had judgment below.

C. Byfield and L. Howland, for appellant.

C. H. Aldrich, J. M. Barnett, T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellee.

WOODS, J. The appellee obtained a judgment against the appellant upon a policy of life insurance, or certificate of membership in the society of the appellant, issued to Francis J. Beck, the husband of the appellee, and made payable to her upon his death. In answer to the complaint, the appellant alleges breaches of the warranties made by the deceased in his application for membership, concerning his health and habits, the specific breaches alleged being that the applicant had liver complaint and dropsy, and was intemperate in the use of intoxicating liquors.

The plaintiff replied by a general denial, and by way of confession and avoidance, to the following effect: "The plaintiff says, that since the death of said Francis J. Beck, to whom the certificate sued on was issued, the said defendant company, with full knowledge and notice of the matters, all and singular, set out in her answer herein, treated the said certificate or policy as a valid and subsisting one, and made assessments on the same, all of which were paid, and for which payments this plaintiff now holds the receipts of the said company, signed by the secretary thereof. And the plaintiff avers that by reason of such assessments, so made as aforesaid, she has paid to said company for six deaths occurring prior to the death of the said Francis J. Beck, and for four deaths occurring subsequent to the same, amounting in the aggregate to eleven dollars and fifty cents, all of which the said defendant demanded and received as aforesaid, and still retains, and by which this plaintiff was induced to believe, and did believe, that the said defendant company recognized the policy or certificate as a valid and subsisting one."

The first question to be considered is, whether the facts stated in this reply constitute a sufficient response to the answer. Upon this point the counsel of appellant have advanced the following propositions: "The payments, if any were made, were voluntary, and there was no obligation to make them, certainly not those assessments upon deaths occurring after the death of the member, Beck. To operate as a revival of a lapsed policy of insurance, the waiver of

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forfeiture must occur during life ; there can be no insurance of a dead man by express contract ; much less can there be by implication. So here, if Beck was not a member of the society at his death, he could not be made one after death even by issuing a certificate in his name ; much less by any administrative act of the officers recognizing him, incidentally, as an existing member, and creating a membership by mere implication or by estoppel. *Neely v. Onondaga, etc., Ins. Co.*, 7 Hill, 49; *Smith v. Saratoga, etc., Ins. Co.*, 3 Hill, 508 ; *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137 ; *Diehl v. Adams, etc., Ins. Co.*, 58 Penn. St. 443 ; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402."

The counsel for the appellee, on the contrary, say: "Our position is, that he (Beck) continued at all times a member of said society, subject to the right on the part of the latter to rescind the contract at any time, upon discovery of the alleged misrepresentations, and equally subject to confirmation ; that although the policy by its terms provides that it shall be 'void' on a breach of any of its conditions, its legal effect is simply to render it voidable at the election of the insurer, and that the insurer can waive the forfeiture and continue the policy in force ; or to state the proposition more broadly, in all contracts where stipulations avoiding the same are inserted for the sole benefit of one of the parties, the word *void* is to be construed as though the contract read *voidable*."

This view seems to be sound in principle, just in practice, and is certainly well sustained by authority. *Armstrong v. Turquand*, 9 Irish C. L. 32 ; s. c., 3 Big. Life & Acc. 350 ; *Viele v. Germania Ins. Co.*, 26 Iowa, 1 ; *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542 ; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693 ; s. c., 9 Am. Rep. 479 ; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67 ; s. c. 17 Am. Rep. 479 ; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108 ; s. c., 28 Am. Rep. 535 ; *Erdmann v. Mut. Ins. Co., etc.*, 44 Wis. 376 ; *Viall v. Genesee Mut. Ins. Co.*, 19 Barb. 440 ; *Clark v. Jones*, 1 Den. 516 ; *Frost v. Saratoga, etc., Ins. Co.*, 5 id. 154 ; *North Berwick Co. v. New England, etc., Ins. Co.*, 52 Me. 336 ; *Sims v. State Ins. Co.*, 47 Mo. 54 ; s. c., 4 Am. Rep. 311 ; *Tuttle v. Robinson*, 33 N. H. 104 ; *Young v. Mut. Life Ins. Co.*, 4 Big. L. & Acc. 1 ; *Garber v. Globe Mut. Ins. Co.*, 6 id. 122.

In the first two cases cited the subject is discussed at length. In *Armstrong v. Turquand*, *supra*, CHRISTIAN, J., speaking for the court says: "Now, I believe I am correct in this (and it is very

remarkable), that amongst those (cases) cited for the defendant (at least during the argument which took place after I had the honor of a seat in this court, the case having been argued before), not one was referred to (nor am I aware that any exists which is law at this day), in which the word 'void' occurring in any private instrument, such as a deed or will, was held to bear that extreme sense which excludes the possibility of confirmation after the act of avoidance."

And in *Viele v. Germania Ins. Co.*, *supra*, the Iowa court says: "The position of defendant's counsel, which is supported by several authorities, is to the effect that upon a breach of the conditions of the policy by the assured, which would defeat recovery thereon, it becomes absolutely void—as it were, dead—and that nothing short of a new creation could impart vitality to it. This doctrine is certainly unsound when applied to other contracts; for on the contrary, after default in the conditions by one party, the other may waive the forfeiture and treat the instrument as of binding force upon himself. No reason can be given to except policies of insurance from the operation of this rule."

The logical and necessary deduction from this doctrine is that a distinct act of affirmance of the contract by the party entitled to avoid it, made with knowledge of the facts and especially such acts as the demand and receipt of premiums or assessments, would constitute a waiver of the forfeiture or of the right to annul the contract; and so it is held in several of the cases already cited. See *Armstrong v. Turquand*, *supra*; *Viele v. Germania Ins. Co.*, *supra*; *Tuttle v. Robinson*, *supra*; *Frost v. Saratoga Mut. Ins. Co.*, *supra*; *Viall v. Genesee Mut. Ins. Co.*, *supra*; *Gans v. St. Paul F. & M. Ins. Co.*, *supra*. There is no reason why this waiver may not occur after as well as before the death of the person whose life was insured.

The remaining question is whether the court erred in excluding certain depositions which the appellant offered to read on the hearing.

[Omitting a question of practice.]

The witnesses, whose depositions were excluded, were physicians who had treated the deceased when sick, and one of them during his last illness. Their testimony in the main concerned the ailments of the patient when under their treatment, and tended strongly to support the allegations of the answer, that he had liver complaint and dropsy, and perhaps died from the effects of those

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maladies. The testimony was excluded on the ground that the witnesses were incompetent.

By the terms of the statute on the subject in force when the trial was had, physicians were not competent witnesses "as to matters confided to them in course of their profession; * * * unless with the consent of party making such confidential communication." The question to be decided therefore is, whether the physician who, in the course of the treatment of his patient, has obtained a knowledge of his ailments, is competent to testify in relation thereto in a civil action without consent of the patient or of the party representing the patient.

The position of counsel for the appellant, as we understand it, is that before the testimony of the physician can be excluded under the statute, it must appear affirmatively that the information was confided to him which he is called on to disclose; and that he be required to testify as to what he learned by observation or by an examination of the patient, and indeed, as to what the patient told him, unless learned or told under an injunction of secrecy, express or implied, as in cases of secret or private diseases.

We think the statute ought to have and was designed to have a much broader scope. The relation of physician and patient, no matter what the supposed ailment, should be protected as strictly confidential, subject only to the right of the patient to waive the restriction; or if the patient shall have died, then subject to the choice of the party who may be said to stand in the place of the deceased and whose interests may be affected by the proposed disclosure.

His admission to the bedside of the sick one may enable the experienced and skillful practitioner to discern more of the patient's condition and of the cause which brought it about than the patient himself could tell or would be willing to reveal; and, whether therefore, the information which he gets is obtained in one way or the other should make no difference in the application of the rule. "A dumb patient and one whose vocal organs have been paralyzed are equally protected by the statute with others. The secrets of the sick chamber cannot be revealed because the patient was too sick to talk, or was temporarily deprived of his faculties by delirium or fever, or any other disease, or because the physician asked no questions. The statute seals the lips of the physician against divulging in a court of justice the intelligence which he acquired while

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in the necessary discharge of his professional duty. It was enacted for the purpose of extending to the relation between a patient and his physician the same rule of public policy by means of which the common law protected the professional confidence necessarily existing between a client and his attorney. We deem it a wise and salutary enactment. * * * It was intended to remove from the law a reproach which had been long felt and often expressed by judges, and it should be interpreted and enforced in a liberal spirit with a view to effectuate its purpose." *Edington v. Mut. Life Ins. Co.*, 5 Hun, 1.

The foregoing was said in reference to the law of New York, but we deem it equally applicable to our own law on the subject. Counsel for the appellant however have urged upon our attention the recent case of *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, wherein it is claimed the New York Court of Appeals has enunciated a different doctrine. But the language of the opinion in that case upon which stress is laid, does not express the opinion of the court, but only of the judge who wrote it, the other judges concurring in the result only. The earlier and later cases decided by that court are in accord with the doctrine above declared. *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; s. c., 36 Am. Rep. 617; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; s. c., 25 Am. Rep. 182; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185. See also *Briggs v. Briggs*, 20 Mich. 34; *Collins v. Mack*, 31 Ark. 684.

[Minor point omitted.]

There is no error in the record, and the judgment is affirmed with costs.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

PRIVETT V. BICKFORD.

(26 Kans. 58.)

Office and officer — disability — qualification after election.

One who was disqualified under the Constitution to "hold office" at the time of his election, is eligible if the disability was removed before the issuing of the certificate and taking possession of the office.

ACTION of *quo warranto*. The opinion states the case.

Grove & Shepard, for plaintiff.

Davis & Jetmore, for defendant.

HORTON, C. J. This is an original action in the nature of *quo warranto*, brought by plaintiff against defendant to try the title to the office of sheriff of the county of Harper, held and occupied by the defendant. An election was held on the 2d of November, 1880, for county officers. At such election plaintiff and one S. S. Singer were the opposing candidates; plaintiff received 607 votes for

sheriff, and S. S. Singer 401 votes. The returns of such election were not canvassed, on account of the refusal of the board of canvassers, until May 16, 1881. The canvass was then made under a peremptory writ of mandamus issued out of this court, and by such canvass plaintiff was declared duly elected as sheriff. Thereafter a certificate of election was issued to plaintiff, and on the 18th of May, 1881, he duly qualified. On the next day he demanded of the defendant the possession of the office, and the records of the same, which defendant refused. The defendant alleges in his answer that on Tuesday succeeding the first Monday of November, 1878, he was elected sheriff of Harper county for the unexpired term ending on the second Monday of January, 1880, and duly qualified and took possession of the office; that he has held possession of the office since, and is now holding and discharging its duties; that there was an omission to fill the office on the first Monday of November, 1879, and therefore he says there was not any vacancy in the office to be filled by an election on the second Monday of November, 1880. He further alleges that the plaintiff, at the time of the election, was ineligible to be elected or hold the office of sheriff, because he had voluntarily borne arms against the government of the United States, and voluntarily aided and abetted in the attempted overthrow of the government during the rebellion.

Upon the question of vacancy, this court recently decided, in *Privett v. Sterens*, 25 Kas. 275, that on the second Monday of November, 1880, there was a vacancy in the office of sheriff in Harper county; that at such election it was lawful to elect a sheriff to fill such vacancy; and therefore nothing further need be said upon the first defense.

The preponderance of the evidence produced upon the trial tends, we think, to support the claim of defendant, that the plaintiff voluntarily bore arms against the government during the late rebellion, but as the legislature of the State, during its session of 1881, removed such disability (Laws of 1881, ch. 106, p. 209), the question is presented whether a person ineligible under the provisions of our Constitution at the election for the office of sheriff, is ineligible to hold the office, provided the disability be removed or cured prior to his receiving his certificate of election and his demand for the possession of the office. Upon this question the weight of authority seems to be, and in our opinion it is the better doctrine, that where the disability concerns the holding of the office, and is not merely a

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disqualification to be elected to an office, a person who is ineligible at the election will be entitled to enter upon and hold the office, if his disability be removed or cured before the issuance of the certificate, and before entering upon the discharge of the duties of the office for which he is elected. The provision of our Constitution is that "no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the first day of April, 1861, provided they have served one year or more therein, shall be qualified to vote or hold office in this State until such disability shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature." (Amendment to the Constitution, adopted Nov. 5, 1867.) This provision operates upon the capacity of the person to take office rather than as a disqualification to be elected to an office. So the disqualification is to the holding of the office and not to the election. There is a marked distinction between a person who is ineligible or incapable of being elected and one who may hold the office. If a person may hold the office he may be elected while he is under the disqualification, and if he becomes qualified after the election and before the holding it is sufficient. In the one case the disqualification strikes at the beginning of the matter—that is, it prohibits the election of an ineligible candidate; in the other case the disqualification relates only to the holding of the office. The Constitution expressly provides that the disability may be removed by a vote of two-thirds of all the members of both branches of the legislature. When the electors of Harper county voted for the plaintiff they had the right to look at and to build their expectations upon this provision, because, although at the election the plaintiff was ineligible to hold office, yet they knew that the legislature had the right to remove the disability, and if removed he was entitled to the possession of the office to which he was preferred by a majority of the electors. If our Constitution provided that the plaintiff was ineligible to be elected instead of being ineligible to hold office, the contention of the defendant would be good; but as the ineligibility is not as to the election but only the holding of the office, such ineligibility is cured by the subsequent removal of the disqualification. In support of these views we refer to the following:

Section 2 of article 1 of the Constitution of the United States ordains that: "No person shall be a representative (in Congress) who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." Mr. John Y. Brown, of Kentucky, who was elected to the house of representatives of the thirty-sixth Congress when he had not reached the age of twenty-five years, and was for that reason ineligible, did not take his seat at the first session; but being of the requisite age at the second session, he took his seat unchallenged by force of the very votes cast for him when he was in fact ineligible.

Section 6 of the same Constitution ordains that " * * * No person holding any office under the United States shall be a member of either house (in Congress) during his continuance in office." Mr. Robert C. Schenck was elected to the thirty-eighth Congress in October, 1862, and on the following March was commissioned as a major-general of volunteers and entered upon the discharge of his duty, but resigned the office before the meeting of Congress in December, 1863. This raised the question whether he could be admitted to a seat, and the answer was in the affirmative. The committee of elections in its report on the subject said: "The inhibition attaches the moment the member enters upon the discharge of his duties as such, and nothing is gained by an earlier application of it."

Again, section 3 of the fourteenth amendment of the same Constitution prescribes: "No person shall be a senator or representative in Congress, or elector of president or vice-president, or hold any office, civil or military, under the United States, or under any State, who having previously taking an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability." Under this provision of the amendment, Judge McCrary, in his work on the Law of Elections, says: "It has been the constant practice of the Congress of the United States since the rebellion to admit persons to seats in that body who were ineligible at the date of their elec-

tion, but whose disabilities had been subsequently removed." 2d ed., p. 232, § 258.

On the 8th of November, 1870, one Murray was elected clerk of the board of supervisors in the county of Waukesha, in Wisconsin, for the term of two years, to commence on the first Monday in January, 1871. At the time of such election Murray was an alien, and had not declared his intention to become a citizen of the United States. On the 14th day of November his disability was removed by appropriate proceedings in the Circuit Court for Milwaukee county, he then becoming a citizen of the United States. Thereafter he commenced an action to obtain possession of the office. The Supreme Court of Wisconsin held that he was entitled to the office to which he was elected, and decided that a person disqualified to take office at the time of the election would, in the absence of any statutory or constitutional provision to the contrary, be entitled to enter upon and discharge its duties, provided his disability be removed before the commencement of the term for which he is elected. *State v. Murray*, 28 Wis. 96; *State v. Trumpf*, 50 id. 103; 1 Cushing's Law and Practice of Legislative Assemblies (2d ed.), §§ 78, 82.

The conclusion reached by us also fits the intimation in *Wood v. Barthing*, 16 Kans. 109, that where a majority of the electors vote for an ineligible candidate, the election is not a nullity. In England, it has been held that where electors have personal and direct knowledge of the ineligibility of the majority candidate, the votes cast for such candidate are void, and the minority candidate is elected. In this country, the great current of authorities sustains the doctrine that the ineligibility of the majority candidate does not elect the minority candidate, and this without reference to the question as to whether the voters knew of the ineligibility of the candidate for whom they voted.* It is considered that in such a case the votes for the ineligible candidate are not void. Therefore the votes cast for the plaintiff were properly counted; and although ineligible to hold office when the votes were cast for him, his disability having been legally removed, he became legally qualified to accept the place which the will of the majority desired him to fill.

Judgment will be entered in favor of the plaintiff for the possession of the office of sheriff, and all the costs in the case are hereby adjudged against the defendant.

All the justices concurring.

* To same effect, *Barnum v. Glynth*, 27 Minn. 466; s. c., 38 Am. Rep. 304. — REP.

BODWELL V. CRAWFORD.

(26 Kans. 292.)

Injunction — to restrain occupant's use of premises.

The owner of real estate, of which another has taken unauthorized possession, cannot have him enjoined from making a legal use of the premises, although it is one of which the landlord disapproves.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

S. O. Thatcher and John Martin, for plaintiff in error.

BREWER, J. This is an application for an injunction, filed in the District Court in Shawnee county. But one question is presented in the record, and that is, whether upon the allegations in the petition the plaintiff is entitled to an injunction. The District Court held that he is not, and from such ruling the plaintiff alleges error. The petition, in brief, states these facts: The plaintiff, as was well known to the defendant, is an eminent Congregational clergyman of pronounced opinions on all moral questions of the day. He was an early settler in Topeka, for some years pastor of the Congregational church in that place, and his reputation there was fixed as a man who believed in the pernicious effects of theaters. For some time past he has resided in the State of New York, but still owning real estate in Topeka, which from time to time he leased to various parties through special contracts executed by himself. In looking after his business and collecting rents, he employed as agents, Ross & Stillson, who had however no authority to lease or to bind the plaintiff by any new contracts. These agents attempted to lease lots of plaintiff's, on which was erected a building known as the "Tabernacle," to the defendant for the purpose of general amusements, including theatrical performances. Plaintiff's repugnance to such amusements was well known to his agents, and should have been known by defendant. As soon as plaintiff heard of this transaction, which he did in a very few days by seeing a notice of it in the paper, he repudiated the same by telegraph to the parties, demanding the abrogation of the pretended lease and

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the cessation of the use of his property for the purposes mentioned, but the defendant declined to abandon the property or discontinue the use. Hence, this action was brought.

Do these facts show a case for the interference of a court of equity by the remedy of an injunction? It is clear that the plaintiff, having never leased the lot or authorized its lease, is entitled to his legal action to recover possession. The defendant has taken possession without authority from the owner, and he has no right to such possession. In all such cases of the unauthorized taking possession of real estate, the ordinary remedy is an action at law for the recovery of possession. Under some circumstances the owner may maintain forcible entry and detainer, and in all he may maintain ejectment. Both are actions at law. Has he the further remedy of injunction? Counsel for plaintiff concede that this is a case of first impression, and that a careful examination of the authorities discloses no precedent for such an action. They insist however that our statute concerning injunctions is very broad—broad enough to cover such a case as this—and that unless equity will interfere there is no adequate remedy. Section 238 of the code authorizes “restraining the commission or continuance of an act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff.” The unauthorized possession by defendant is of course an injury to plaintiff’s rights, and entitles him to relief; but no one will contend that a mere unlawful possession gives occasion for the interference of a court of equity. The reasons for this are familiar to every lawyer. In equity neither party is of right entitled to a jury, but the Constitution preserves inviolate the right of trial by jury as it exists at the common law, and an action for the recovery of real estate is one in which at common law parties are entitled to a trial by jury. They have a right to the verdict of a jury upon the questions whether plaintiff was owner, whether the defendant was in possession, and whether if so the possession was unlawful. In this very case defendant has a right to the verdict of a jury upon the questions whether Ross & Stillson were general agents of plaintiff and generally authorized to bind him by leases, or were specially authorized to make a lease of these lots without any limitations as to the purposes for which they should be used, and indeed upon every fact essential to plaintiff’s right to the possession of the premises. The legislature has not the power, even if it should attempt it, to deprive a party

of this right of trial by jury by simply changing the form of the action ; for if it could in respect to the recovery of real estate, it could in respect to any other common-law action, and so by simply legislating as to forms, set at naught the constitutional guaranty. Does the fact that the defendant, having an unlawful possession, is using the property for purposes abhorrent to the plaintiff's convictions, justify the interference of a court of equity ? It must be borne in mind that the use to which this property was put by defendant, however obnoxious to the plaintiff, is not illegal. The defendant violates no law in running a theater, and whatever may be the opinions of the plaintiff or others as to the immoral tendencies of the theater, the law does not condemn its existence. Doubtless the plaintiff feels outraged by having his property used for such purposes, but can it be said that his legal rights are infringed by use for any purpose which the law does not condemn ? Careful reflection convinces us that equity will be permitted to interfere to restrain a use, if at all, only when the use is illegal ; for there are vast numbers of uses to which property may be put which are sanctioned by law, yet which are immoral in their tendencies in the judgment of many, and obnoxious to their convictions of what is right, as well as what is useful and best for society. One may disbelieve in theaters, another in public ball-rooms, and a third in rooms where brokers gamble in stocks, provisions, etc., while still another in lecture-rooms which are open to Spiritualists, Universalists, and infidels. Political convictions are intense in some, and the use of their property by the adherents of another political party, or for the dissemination of opposite political opinions, would be felt to be an outrage and trespass upon their convictions. Indeed, the diversity of belief is so great that a vast number of the uses to which property may legally be put, would be found wrong in the judgment of some. In all such cases can equity be permitted to interfere and restrain the use because of the honest convictions of the owner of the impropriety or immorality of such use ? The very great number of cases which in such event would be transferred from the domain of law to that of equity, and thus be relieved from the constitutional guaranty of a trial by jury, compels the conclusion that no precedent can be found, because none can constitutionally be made. Counsel refer to cases in which a lessor has obtained an injunction to restrain the lessee from putting property to uses forbidden by the lease, but

those cases are not in point ; the principle which underlies them is very different. The lessor has a right to the continuance of the lease, to the benefits of the rent ; in affirming the contract he is simply insisting that the lessee shall also conform to the contract. True, he may perhaps declare the lease forfeited and recover the property, but he may not desire to do this ; he may not be able to lease for the same rent or to an equally responsible tenant, and the lessee ought not to be permitted to compel the lessor either to take back the property or tolerate a forbidden use. But here the unauthorized lease was for theatrical purposes ; the plaintiff cannot affirm it in part and disavow it in part. He cannot compel the defendant to retain the property and pay rent, and at the same time discontinue the purpose for which he attempted to lease it. By his suit he disavows this act of his agents — this unauthorized lease — and must therefore repudiate it *in toto*. It is simply the case of the defendant unlawfully taking possession of the plaintiff's property. The relation of landlord and tenant never existed. There is no contract relation between the parties. Defendant by his possession and use has violated no contract, and by his use violates no law. In such case the only remedy is the ordinary common-law action for the recovery of possession.

So far as the reputation of the plaintiff is concerned in the community where he once lived, where he is now well known and honored, that reputation is sustained by his prompt disavowal of the unauthorized lease and an action at law for the recovery of possession, as fully as it would be by a suit in equity. He stands before the community proclaiming his continued adherence to his old-time convictions, and cannot for a moment be thought to have dallied with what he believes to be wrong. Those convictions the law will respect ; it will protect defendant in his adherence to them, and will give to the fullest extent all its ordinary processes and remedies for their protection.

Counsel, conceding that there is no precedent to sustain this action, intimate that this court should establish one ; but it is the duty of courts to stand by the ancient landmarks, to walk *super antiquas vias*. Additional remedies must be established by other bodies and in other ways.

The conclusion therefore to which we are necessarily led is, that the facts stated by plaintiff in his petition are not such as will en-

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title him to the interference of a court of equity, or take away the constitutional guaranty of trial by jury.

The judgment of the District Court will therefore be affirmed.

Judgment affirmed.

All the justices concurring.

JONES STATIONERY AND PAPER COMPANY V. CASE.

(25 Kans. 299.)

Execution — levy — property in custody of court.

Personal property under levy on execution is not subject to a subsequent levy on another execution from any court.

THE opinion states the case.

Webb & Sowers, for plaintiffs in error.

Case & Moss, for defendants in error.

BREWER, J. There is but a single question in this case. Under process regular and valid, a constable levied upon certain personal property; thereafter under process from a different court, another constable attempted to levy upon the same property while in the possession of the first constable. Was such attempted second levy good? In other words, is property duly levied on and in the possession of the officer making the levy, subject to levy by another officer holding process from the same or a different court? So far as to the form of the actions and the regularity of the proceedings, the agreed statement shuts them out from consideration, and leaves to us the single questions above named.

Reluctantly we answer this question in the negative: it is a general truth that when property has been once seized and taken into possession by any officer under any valid process, it is *in custodia legis*, and beyond the reach of further touch or attack except as prescribed by statute. "In general, when things are *in custodia legis*, they cannot be interfered with by a private person or by another officer acting under the authority of a different court and jurisdiction; they are in the custody of the law until the proper

time of their sale, and for such a reasonable time thereafter as may be necessary for the purchaser to remove them. During this time they are beyond the reach of seizure by any other execution, attachment, or any other writ." Herman on Executions, § 173. The same doctrine is affirmed in Freeman on Executions, § 135, and supported by a large number of authorities cited by the author. It is true the authorities cited refer generally to cases in which process issues from courts of different jurisdictions, but the principle which underlies and determines those cases controls here. The principle is this : In order to make a levy there must be possession — at least this is true of personal property. Bouvier's Dictionary, vol. 2, p. 39, says that "in order to make a valid levy on personal property the sheriff must have it within his power and control;" in other words, in order to make a valid levy, the officer levying must have full and exclusive possession. It matters not what outside or ultimate rights there may be, the officer levying an execution upon personal property must have that property in his absolute and exclusive possession, and this partially at least for his own protection, because he becomes responsible for the property to the plaintiff in his execution. A levy means this and nothing else. Civ. Code, § 444; *Goode v. Longmire*, 35 Ala. 668; *Davidson v. Waldron*, 31 Ill. 120; *Douglas v. Orr*, 58 Mo. 573; *Allen v. McCulla*, 25 Iowa, 464. And secondly, when property is thus levied upon, when it is in possession of an officer of the law, when it is as the law books say, *in custodia legis*, it is safe from touch or seizure. Of course we are not now considering direct proceedings, such as replevin, etc. It matters not whether the officer in possession be a constable, a sheriff, or a receiver — it is still *in custodia legis*. It is true the remedies may be different whether the possession be that of a constable or a receiver, but still the ultimate fact is the same, that the possession is the possession of the law. Such possession, when once established, is absolute and exclusive; it cannot be interfered with, it cannot be divided.

When a sheriff has levied, a marshal cannot touch, and *vice versa*; when a sheriff has levied, a constable cannot touch, and *vice versa*; when a constable has levied, no other constable can touch. The levy made must in some way be carried out to completion, whether by sale of the property or by payment of the judgment before any other legal process can attach, because if the first levy implies absolute and exclusive possession, there is nothing for

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the second levy to touch. There is no provision of statute for dividing the possession. The first officer owes no duty to the second officer ; none to the plaintiff in the last judgment. If the process in his hands is satisfied — and it may be satisfied before and without any sale — or if the plaintiff in the judgment directs the return of the process, his duties are discharged, save that the property unsold he must return to the defendant. By no statute is he required or authorized to hold it for the benefit of any other constable, or the plaintiff in any other judgment. The defendant has a right to it by reason of his ownership, and no statute casts any right upon the officer to retain possession for the benefit of any other officer, or will protect him against an action of the defendant for refusing to return it to him. It certainly would not be just for the second officer to charge him with the responsibility of a second levy, when he can take no possession, cannot interfere with the possession of the first officer, cannot know absolutely when that possession will cease, and when the first officer owes him no duty, for it would be casting upon him a responsibility without giving him the power of protecting himself, and throwing him upon the mercy of another officer, who owes him no duty, and may have no desire to assist him. The case of *Benson v. Berry*, 55 Barb. 620, seems to be authority in favor of the defendant in error, but that decision may find warrant in the special statutes of New York, and if not so authorized, is in conflict with the principles underlying the authorities cited in *Herman and Freeman*, above noticed, as well as with the general rules determining the scope and effect of a levy.

It might be well if there were a statute making provision for a second levy, and requiring the officer making the levy to retain the property for the second officer, after his own process has been satisfied, and making the sureties on his bond responsible for delinquencies in that respect. Such a provision would doubtless be in the interests of justice, for now the only security to the second judgment creditor seems to be in the provision that the first officer shall only levy upon property apparently sufficient to satisfy his debt, and this provision will often be found inadequate to secure the just rights of all ; but until the legislature does make some such statutory provision, it seems that the absolute possession required to perfect a levy prevents any further seizure by any other officer.

The judgment of the District Court will therefore be reversed,

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and the case remanded for further proceedings in accordance with the views herein expressed.

The costs, as by the stipulation, will be paid out of the proceeds of the property.

Judgment reversed.

All the justices concurring.

KILLAM V. SCHOEPS.

(36 Kans. 310.)

Negotiable instrument — what is not.

A written provision to pay a certain sum of money at a certain time to the order of another, but joined with a stipulation concerning the title to property, and promises in respect to the same, and a warranty as to the pecuniary responsibility of the promisor, is not negotiable.

ACTION on a written instrument. The opinion states the case. The defendant had judgment below.

Bowman & Bucher, for plaintiff in error.

J. W. Ady, for defendant in error.

BREWER, J. The single question in this case is whether the following instrument is a negotiable promissory note :

“§55.

BURTON, KANSAS, *June 24, 1878.*

“On or before the first day of November, 1880, I promise to pay to the order of Aultman, Miller & Co., fifty-five dollars, with interest at ten per cent from date, payable at express office, Burrton, Kansas; and if not paid at maturity, with annual interest at twelve per cent on the amount then due until paid. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, and all defenses on the ground of any extension of the time of its payment, that may be given by the holder or holders to them or either of them. And it is hereby agreed by and between the maker hereof and Aultman, Miller & Co., that the Buckeye mower and reaper No. — (for the

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use of which to the maturity hereof this note is given), is now and shall remain the property of Aultman, Miller & Co.; and in default of payment hereof the said machine shall be returned to Aultman, Miller & Co., their agent or attorney. For the purpose of obtaining credit I, John Schoeps, certify that I own in my own 80 acres of land in township of Lake, county of Harvey and State of Kansas, of which 80 are improved, and the whole worth \$1,500, and that it is unincumbered except to the amount of \$—. I also own \$500 worth of personal property over all indebtedness and legal exemptions, and there are no judgments against me.

“JOHN SCHOEPS.”

This question must be answered in the negative. The contract stated in this instrument is not simply a promise to pay money, but a stipulation concerning the title to property, and a promise in reference to the future disposition of such property. It is essential to the negotiability of paper that there is in it but the single promise to pay money. You may not incorporate with such a promise stipulations and agreements as to other matters, and then say that the absolute promise to pay money lifts the contract into the region of negotiable paper. This is the general rule, and whatever exceptions there may be, this is not one. In 1 Daniel on Neg. Inst. § 59, the rule is thus stated: “In the sixth place, it is essential to the negotiability of the bill or note, that it purport to be only for the payment of money. Such at least may be stated to be the general rule, for if any other agreement of a different character be engrafted upon it, it becomes a special contract, clogged and involved with other matters, and has been deemed to lose thereby its character as a commercial instrument.” Now this instrument touches other matters and contains other stipulations and provisions than those respecting the payment of money. It is a contract in respect to the title to property. It is also a contract for the possession of property, and because of these additional stipulations it is something more than a simple promise to pay money. It is true that in the case of *Seaton v. Scovill*, 18 Kans. 433, we held that the addition of a stipulation to pay costs of collecting, including reasonable attorney’s fees, did not render non-negotiable a note otherwise negotiable; but that, like a promise to pay interest or exchange, was simply a promise to pay money. We felt that in that case we were carrying the law to its extreme limit; hesitatingly we

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reached the conclusion there announced. The authorities are far from uniform in support of that decision ; many of the highest courts in the land have differed from the views there expressed ; still we believe the rule as there stated correct, but do not think there should be any extension thereof. The case at bar goes a long way beyond that ; the additional stipulation is not in reference to the payment of money, but a matter entirely foreign and distinct. There might as well be included in one agreement a contract for the lease of real estate, or the hiring of chattels, or the performance of labor with an absolute promise to pay a sum certain at a certain time, and then affirm that by reason of this absolute promise the entire contract is a negotiable instrument. This is not the law. Doubtless many of the rules respecting negotiable paper are purely arbitrary, but nevertheless they are well settled and ought to be rigorously enforced. Among those rules is that of the unity of the contract, the singleness of the promise to pay, and we think no departure should be made from the spirit or letter of those rules.

We conclude then, that whenever any stipulation concerning other matters than the payment of money is incorporated in one instrument with a promise to pay money, such double contract will not be adjudged a negotiable paper. See in addition to the authorities cited by Daniel in his work on Negotiable Instruments, at the close of the extract heretofore made, the cases of *Fletcher v. Thompson*, 55 N. H. 308, and especially that of *Bank v. Armstrong*, 25 Minn. 530.

The judgment of the District Court will therefore be affirmed.

Judgment affirmed.

All the justices concurring.

KIRKPATRICK V. EAGLE LODGE.

(26 Kans. 384.)

Slander and libel — privileged communication.

The report of a committee of a lodge of Odd Fellows, recommending the expulsion of a member for false swearing, made in accordance with the rules and customs of the order, and published in a pamphlet account of the transactions of the lodge, for the use of the members, according to the ordinary practice, is *prima facie* privileged.*

ACTION of libel. The opinion states the case. The defendant had judgment below.

Thomas P. Fenton, for plaintiff in error.

John Martin and *John W. Day*, for defendants in error.

HORTON, C. J. Upon the trial of this cause, the defendants in error objected to any evidence under the petition, on the ground that it does not state facts sufficient to constitute a cause of action. The court sustained the objection, and judgment was rendered against plaintiff for costs. The only question in this case is, whether such ruling and judgment are correct. The substance of the petition is that the Eagle Lodge No. 32, of the Independent Order of Odd Fellows, and the Grand Lodge of the Independent Order of Odd Fellows of Kansas, are private corporations, duly organized under the laws of the State; that the plaintiff was of good character, and had been admitted a member of the Eagle Lodge; that he had at all times conducted himself as a faithful Odd Fellow, and an honest, truthful and upright citizen, and had never been guilty, or suspected to have been guilty, of any infamous lie, falsehood or perjury; that the plaintiff had filed at one time his petition in the Grand Lodge, complaining of the doings and proceedings of Eagle Lodge, and asking that the Grand Lodge take such action thereon as the justice of the case might require, which petition plaintiff had verified by his own affidavit annexed thereto; that afterward the Eagle Lodge summarily and wrongfully expelled the plaintiff from its membership on a false and malicious

* See *Maurice v. Worden* (54 Md. 235), 39 Am. Rep. 384; *Wiemer v. Mabes*, post.

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charge of perjury preferred against plaintiff in the Eagle Lodge, in his having verified his petition to the Grand Lodge, making complaints against the Eagle Lodge; that the defendants, well knowing the premises, and maliciously intending and contriving to injure him in his character and reputation as a citizen and Odd Fellow, and maliciously intending and contriving to bring him into public scandal, infamy and disgrace among his neighbors, the citizens of the State, and all good Odd Fellows, did, on the 16th day of October, 1873, in Jefferson county, and at other times and places, falsely, wickedly and maliciously print and publish, and cause to be printed and published in a certain paper, book or pamphlet, having the title, "Grand Lodge Journal, 1873," indorsed on the back thereof, a certain false, malicious and libellous matter, to wit:

"G. W. Martin, from the special committee on the memorial of William Kirkpatrick (meaning plaintiff), submitted the following report, which was unanimously adopted :

"To the R. W. Grand Lodge, Kansas, I. O. O. F.:

* * * "Your committee, to which was referred the petition of William Kirkpatrick, * * * to have set aside certain action of Eagle Lodge No. 32, have had the same under consideration, and having visited Eagle Lodge No. 32, by your orders, to examine into the grievances of said Kirkpatrick, I am prepared to say that his * * * expulsion on the charge of perjury, from which he appealed, was well merited. On the occasion of that visit I carefully examined the brethren present, including the noble grand of the lodge at the time of Kirkpatrick's first trial, the chairman of the committee charged with the register of evidence, the sitting past grand who appeared on behalf of the lodge, and the brother who defended the accused. * * * They were unanimous in the expression that the statements concerning said trial, sworn to by Kirkpatrick, and presented at your last session, are all infamously untrue, * * * hence the expulsion for perjury. The testimony on charges in the first case being scattered and lost, I would recommend that the petition be not entered, and that in justice to said Eagle Lodge, it be not spread upon the minutes.

"Respectfully submitted,

"GEO. W. MARTIN."

That by means thereof the plaintiff has been greatly injured in his good name and reputation, to the damage of \$20,000.

We think that the publication complained of imported a libel, for which an action would lie, unless the publication was privileged under the law. The publication was clearly of a character to injure the plaintiff among his neighbors and citizens of the State, and bring "his private character, and the plaintiff himself, into contempt and disgrace with all honest men." *Russell v. Anthony*, 21 Kans. 450; *Lansing v. Carpenter*, 9 Wis. 541; 1 Hill on Torts, p. 237, § 13. Counsel for defendants refer to cases, that to say of a man, he has sworn falsely, is not actionable. These do not apply. Many charges, which if merely spoken of another would not sustain an action for slander, will, if printed and published, sustain an action for libel. The principal question in the case is "whether the publication is absolutely privileged, or only conditionally privileged." In brief, can it be said that upon the allegations of the petition no action will lie? Cooley on Torts, p. 211, classifies privileged cases as follows:

"1. Cases absolutely privileged, so that no action will lie, even though it be averred that the injurious publication was both false and malicious.

2. Cases privileged, but only to this extent: That the circumstances are held to preclude any presumption of malice, but still leave the party responsible if both falsehood and malice are affirmatively shown."

Under the head of cases absolutely privileged are cited: The testimony of witnesses in judicial proceedings; the language of jurors spoken to their fellows in consultations of the jury room, concerning the proper subject matter of their deliberations; the case of a party presenting his cause to the court or jury, or of counsel standing in his place doing the same; words spoken in the course of judicial proceedings, though they are such as impute crime to another, when applicable and pertinent to the subject of the inquiry; the speech or debate of a legislator; the official utterances of the executive of the Nation and the governors of the several States; the orders of judges of courts, and judicial officers while acting within the limits of their jurisdiction; the pleadings and other papers filed by parties in the course of judicial proceedings, so long as they do not wander from what is material to libel parties; so affidavits made for commencing proceedings before magistrates,

and the preliminary proceedings, and information taken or given for bringing supposed guilty parties to justice.

Under the classification of cases only conditionally privileged, "are those in which the utterance or publication is on a lawful occasion, which fully protects it, unless the occasion has been abused to gratify malice or ill-will; a petition to the executive, or other appointing power, in favor of an applicant for an office, or a remonstrance against such an applicant, is a publication thus privileged. No action will lie for false statements contained in it, unless it be shown that it was both false and malicious; and this rule will apply to petitions, applications and remonstrances of all sorts, addressed by the citizen to any officer or official body, asking what such officer or body may lawfully grant, or remonstrating against any thing which it might lawfully withhold. It is a necessary part of the right of petition that such paper, presented in good faith, should be protected, and it is privileged while being circulated, as well as after it is presented. All official communications made by an officer in the discharge of a public duty are under the like protection; so are communications by members of corporate bodies, churches and other voluntary societies, addressed to the body, or any official thereof, and stating facts, which if true, it is proper should be thus communicated."

Under this classification, which is fully sustained by the authorities, the publication complained of is only conditionally privileged, and as the averments in the petition are, that the injurious publication is false and malicious, and that the defendants, well knowing its falsity, maliciously published it for the purpose of bringing the plaintiff into public scandal, infamy and disgrace, the petition states a cause of action; but no recovery can be had thereon without proof of express malice on the part of the defendants, though the charge imputed in the publication be without foundation. The authorities upon cases conditionally privileged are fully collated in *Shurtleff v. Stevens*, 51 Vt. 501; s. c., 31 Am. Rep. 698. In the publication of an unauthorized communication, where the words charged are sufficient in themselves to sustain an action for libel, the plaintiff need only prove the publication. It devolves then upon the defendant to show by evidence that the words are true, or were published under such circumstances as not to be of an injurious nature. If words in themselves are actionable, and the publication not privileged, malicious

intent in publishing them is an inference of law, and therefore needs no proof. But where the circumstances of the speaking and publishing are conditionally privileged — that is, where the circumstances of such publication are such as to repel the inference of malice, and exclude any liability of the defendant, unless upon proof of actual malice, the plaintiff must furnish such proof; and this is the rule that must govern here. *How v. Bodman*, 1 Dis. 115; *Dial v. Holter*, 6 Ohio St. 228.

The judgment of the District Court must be reversed, and the case remanded.

Judgment reversed.

All the justices concurring.

HERMAN v. LYNCH.

(26 Kans. 435.)

Bankruptcy — “*fiduciary character*” — *gratuitous bailee*.

One receiving money from another, gratuitously to purchase, exchange and remit to a third, acts in a “*fiduciary character*,” within the bankrupt act, and is not relieved by his discharge in bankruptcy.

SUFFICIENTLY reported in note, 39 Am. Rep. 723.

ELDER v. DYER.

(26 Kans. 604.)

Limitation — *statute of* — *acknowledgment* — *statutory construction*.

One of two makers of a note wrote the holder a letter, suggesting that he proceed against his co-maker, and saying, “I do not want to be held longer on the note.” *Held*, an “*acknowledgment of an existing liability*,” within the statute.

SEE note, *ante*, 160

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CHAPSKY V. WOOD.

(26 Kans. 660.)

Parent and child — custody of child — rights of third persons.

Parents being poor, orally gave their daughter at birth to the mother's sister, who well cared for and kept it five years and a half. The father having acquired wealth, and the mother having died, applied for the child. The father was neither unkind nor immoral, but exhibited "a coldness, a lack of energy, and a shiftlessness of disposition," and proposed to put the child with his sister and mother, who had never seen it, the child's mother having been disowned or repudiated by the father's father. *Held*, that the application must be denied. (See note, p. 327.)

HABEAS CORPUS. The opinion states the case.

Howell Jones, J. D. McFarland, John Martin, and J. D. S. Cook, for petitioner.

George R. Peck and L. C. Slavens, for respondents.

BREWER, J. In this case of the petition of Morris A. Chapsky for the possession of his minor child, counsel have in their arguments expressed very feelingly and truthfully the embarrassments and difficulties which surround the decision of a case like this. These arise not because there is a conflicting question of fact to be settled by the court, for that is a matter of every-day occurrence in judicial proceedings; it is not that it is a question between a grown man on one side and a grown woman on the other, for we could dispose of every question affecting simply them, without any embarrassment or hesitation. The burden of the case is, that the decision is one which involves the future welfare of a little girl; and I think no man can look upon the face of a bright and happy little girl, like the one before us, and come to a decision of a question which may make or mar her future life, without hesitation and feeling; certainly we are not so insensible as to be able to do it.

The questions of law which are involved in a case like this are few in number, and I think not subject to much doubt. They may be summed up briefly thus: The father is the natural guardian and is *prima facie* entitled to the custody of his minor child.

This right springs from two sources : one is that he who brings a child, a helpless being into life, ought to take care of that child until it is able to take care of itself ; and because of this obligation to take care of and support this helpless being arises a reciprocal right to the custody and care of the offspring whom he must support ; and the other reason is, that it is a law of nature that the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation.

The second proposition of law is, that a child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. In this it differs from the gift of any article which is only property. If to-day Morris Chapsky should give a horse to another party, that gift is for all time irrevocable, and the property never can be reclaimed ; but he cannot by simply giving away his child relieve himself from the obligation to support that child, nor deprive himself of the right to its custody.

I might say here that the statute has provided for a relinquishment through Probate Court proceedings, which may be considered (but that is outside this case) irrevocable.

The third proposition is, that a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case and relieve us from all future difficulties. A mere right of property may be asserted by any man, no matter how bad, immoral, or unworthy he may be ; but no case can be found in which the courts have given to the father, who was a drunkard and a man of gross immoralities, the custody of a minor child, especially when that child is a girl. The fact that in such cases the courts have always refused the father the custody of his child, shows that he has not an absolute and uncontrollable right thereto.

The fourth proposition is, that though the gift of the child be revocable, yet when the gift has been once made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then whether the courts will enforce the father's right to the custody of the child will depend mainly upon the

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question whether such custody will promote the welfare and interest of such child. The distinction must be recognized. If immediately after the gift reclamation is sought, and the father is not what may be called an unfit person by reason of immorality, etc., the courts will pay little attention to any mere speculation as to the probability of benefit to the child by leaving or returning it. In other words, they will consider that the law of nature, which declares the strength of a father's love is more to be considered than any mere speculation whatever as to the advantages which possible wealth and social position might otherwise bestow. But on the other hand, when reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact that ties of blood weaken, and ties of companionship strengthen, by lapse of time ; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.

The fifth proposition is, that in questions of this kind three interests should be considered : The right of the father must be considered ; the right of the one who has filled the parental place for years should be considered. Perhaps it may not be technically correct to speak of that as a right ; and yet they who have for years filled the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy when the burden is especially heavy, when the labor and care are of a kind whose value cannot be expressed in money — when all these labors have been performed and the child has bloomed into bright and happy girlhood, it is but fair and proper that their previous faithfulness, and the interest and affection which these labors have created in them, should be respected. Above all things, the paramount consideration is, what will promote the welfare of the child ? These, I think, are about all the rules of law applicable to a case of this kind.

Now passing to the facts which I shall only outline : Morris A. Chapsky married the mother of this child ten years ago. The marriage was not acceptable to his parents, though for no reason that we are advised of, involving the character of any of the parties.

Returning home immediately after his marriage, the father, commenting upon the fact of the marriage, which had been made without his consent, was not satisfied, and bade him start out for himself. Some criticism has been placed upon his conduct, which we think is not deserved. It is often best for a young man that he should be turned out upon his own resources and compelled to struggle for himself; and that his father was not destitute of affection for his child, is patent, from the fact that he made him a gift of money largely in excess of that which most young men have to start with. Whether his judgment was good, or otherwise, cuts no figure in this case. He started out with his money, and wandered around, as a young man is apt to do, and drifting from place to place, finally came penniless to Kansas City. He struggled for a series of years under pecuniary embarrassment; and during these years this child was born. His wife's health was delicate, and she was obviously unable to discharge ordinary household duties, even without the care of this child; and the respondent, Mrs. Wood, her sister, kindly provided for her during her confinement, and took care of the child. The child was left with her (Mrs. Wood), and from that day to this, a period of about five and one-half years, has been all the time in her custody. During the very early infancy of the child, the question arose as to her custody—Mrs. Wood insisting that the mother should take the child, or that it should be given to her. It is clear that this matter of discussion between the parties lasted for some time, and we are satisfied from the testimony that in fact a gift was made of the child by both mother and father, to Mrs. Wood. The mother's letters exhibit this; and while the father does not recollect of having made such gift, we are convinced that he did so, and by parol agreement relinquished to the respondents his parental rights. No writing passed between them; but regarding as we do that a gift is not decisive in the case, unless made in accordance with the statutory form, the want of a writing cuts no figure now. The child was given to Mrs. Wood, and has been in her care for five years and a half—from the date of its birth to the present day. What the future of the child will be is a question of probability. No one is wise enough to forecast, or determine absolutely, what or what would not be best for it; yet we have to act upon these probabilities from the testimony before us, guided by the ordinary laws of human experience. Involved in the question as to what will pro-

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mote the welfare of the child, are questions of wealth, questions of social position, questions of health, questions of educational advantages, moral training — of all things, in short, which will tend to develop a little girl into a perfect woman.

And first, we remark that the child has had, and enjoys to-day, good advantages, and its welfare has been promoted, and is promoted to-day. No one has said that this child has lacked anything which a child should have, and the testimony all shows that it has been cared for most patiently and faithfully — as well as it could have been cared for by any one ; and to that care the face and appearance of the child abundantly testify. This fact does not rest on probabilities. It is a serious question, always to be considered, whether a change should be advised. “Let well enough alone,” is an axiom founded on abundant experience. There is nothing in the present situation of the respondents, their pecuniary condition, the business capacity of the husband, their social position, their affection for this child — absolutely nothing which tends in any way to suggest that the welfare of the child, which has been promoted in the past, would be limited or abridged in the future. What they have done for the child tends to show what they will do through the future years of its girlhood. What that has been is certainly as much, and I think more, than the average child receives.

Again, while there is more wealth on the side of the father, and pecuniary advantages are held out for her future — greater than those, perhaps, which the respondents can present — yet we cannot be insensible to the surroundings under which the child would be placed if committed to its father. The grandfather has been on the stand before us, and not merely from the testimony adduced from his relatives and neighbors, but from his appearance and manner on the stand, evidently he is a gentleman of character and responsibility, not destitute of affection, and one who has provided a comfortable home and is in a position to give to the child all these advantages. Yet the child if it goes, goes to the care of its father ; and while there is no testimony showing that the father is what might be called an unfit person, that his life has not been a moral one, yet we can but think that it is developed, both by testimony and his manner and appearance on the stand, that there is a coldness, a lack of energy, and a shiftlessness of disposition, which would not make his personal guardianship of the child the most likely to

ripen and develop her character fully. He seems to us like a man still and cold, and a warm-hearted child would shrink and wither under care of such a nature, rather than ripen and develop. These are facts that we can but notice, and they have in them no imputation against the father of an unkind nature or immoral life ; but the facts as they impress us are, that the child would not really grow to its fullest promise under the care of such a man.

Again and lastly, the child has had, and has to-day, all that a mother's love and care can give. The affection which a mother may have and does have, springing from the fact that a child is her offspring, is an affection which perhaps no other one can really possess ; but so far as it is possible, springing from years of patient care of a little, helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent, that so far as a mother's love can be equaled, its foster-mother has that love, and will continue to have it.

On the other hand if she goes to the house of her father's family, the female inmates are an aunt, just ripening into womanhood, and a grandmother ; they have never seen the child ; they have no affection for it springing from years of companionship. While she is a child of perhaps a favorite son or brother, she is also the child of a disowned or repudiated daughter-in-law and sister-in-law, and the appeal which the child will make naturally — and the child is one to make a strong appeal to any one — will always be shadowed and clouded by the fact that she comes from one who was not a favorite in that family.

Human impulses are such that doubtless they would form an affection for the child — it is hardly possible to believe otherwise ; but to that deep, strong, patient love which springs either from motherhood or from a patient care during years of helpless babyhood, they will be strangers.

They cannot have this ; and to my mind, I am frank to say, this last is the controlling consideration. And these three considerations are those which compel us to say that we cannot believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child ; and if we should see a child of our in the same circumstances, we cannot believe that we should deem it wise or prudent to advise a change, notwith-

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standing the pecuniary advantages that might seem to be offered to it.

The judgment of the court therefore is, that the child will be remanded to the respondents ; and the petition is dismissed, at the cost of the petitioner.

All the justices concurring.

NOTE BY THE REPORTER. — The courts in recent times have gone to great lengths in relaxing the rule recognizing the father's paramount right of custody of his infant child. Especially has the mother's equal natural right grown in regard, and the best interests of the child have become the decisive test. As to the right of custody, as between the disagreeing parents, we call attention to the recent cases of *Matter of Bort*, 25 Kans. 308 ; s. c., 37 Am. Rep. 255 ; *McKim v. McKim*, 12 R. I. 462 ; s. c., 34 Am. Rep. 694.

But the courts have of late gone to great lengths in implying a consent, by the father, to a relinquishment of a more or less permanent character, in favor of others than the mother. We do not of course speak of an express relinquishment by agreement, nor of emancipation, nor of cases where the parent is morally unfit to have charge of the offspring, or unable properly to support them ; but of course where the claimants stand practically equal in merit and ability.

The most recent case on this subject is *Verser v. Ford*, 37 Ark. 27. An infant daughter, whose mother had died at its birth, was then by the father's assent taken by the mother's parents, and was properly cared for and supported by them until she was nearly three years of age, when the father demanded her. She was in delicate health. The father was of good character and sufficient means, but was remarried. It was held that the chancellor's decree denying his application should be affirmed. The court said : " It is one of the cardinal principles of nature and of law, that as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot without the most shocking injustice be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone. As between the father, too, and the mother, or any other near relation of the infant, where sympathies on either side of the tenderest nature may be relied on with confidence, the father is generally to be preferred. In the great majority of cases, his greater ability and knowledge of the world render him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate, and promote the happiness of the child, according to his own best judgment and the means within his power. Any system of jurisprudence which would enable the courts, in their discretion and with a view solely to the child's best interests, to take from him that right and interfere with those duties, would be intolerably tyrannical, as well as Utopian." But the court further said there are exceptional cases, " of such urgency as to overcome all considerations based upon the natural affections and moral obligations of the father," and although they conceded that this child, if found with the father, might not be given to the grandmother, yet considering its sex, tender age, delicate health, and the " step-mother," they concluded to leave her where she was, subject to the father's right to apply for her when she becomes older, and to direct her education and have access to her, but they intimate that he ought to be more respectful to the grandfather.

In *Lynn v. Blenkins*, Jacobs, 245, three infant motherless children, of tender age, had been placed by their father with their grandmother, who having supported and educated them for several years, and having provided amply for them by will died, and the children continued for several years longer with their maiden aunt, who was their trustee, and continued to educate and support them. The father was a Unitarian minister, with an income of about £400 a year, and had remarried. The aunt had also married. The children were 19, 14, and 12 years of age, respectively, had been brought up Baptists by the aunt, and preferred to remain with her. The court refused to change their custody on the

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father's demand. The chancellor, Lord Eldon, disclaimed any bias on account of the dissenting tenets of the father, but put his decision on the ground of the father's long consent and acquiescence and his inferior means.

In *The King v. Isley*, 5 Ad. & Ell. 441, the father, on his wife's death, induced her parents to come from America, at considerable expense, and take charge of the children, promising never to remove them, but providing for them himself. They were six and nine, respectively, delicate in health, and one of them was weak in intellect. The father died, leaving a provision for them by will, and appointing guardians. On *habeas corpus*, the guardians were awarded the custody.

In *Reg. v. Smith*, 16 Eng. L. & Eq. 221, the father of a daughter five years of age, anticipating the mother's death, agreed to let the mother's brother have it until it was able to support itself, and agreed not to take it away and to pay a monthly sum for its support. It was held that the father might recover the child after some months. The court merely said that the father "is at liberty to revoke that consent."

In *Mayne v. Baldwin*, 1 Halst. 454, the father had orally intrusted his infant daughter aged between five and six years, to a stranger until she should become of age, but in two years the court ordered her restoration. The court said: "The care and custody of minor children is a personal trust in the father, and he has no general power to dispose of them to another."

In *United States v. Green*, 3 Mas. 482, the father being embarrassed had allowed his wife and child to remain with the wife's father for some three years, and the mother then having died, and having requested her father to adopt the child, the child's father had allowed it to remain with him four years longer. Elisha Williams moved for its restoration to the father, but STORR, J., said, "It is an entire mistake to suppose the court is bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody," and said that the interests of the infant, and its wishes, if it is of sufficient discretion, will be considered. No decision however was pronounced, for the parties settled their differences in court.

In *People v. Mercen*, 3 Hill, 399, the Supreme Court of New York held that an agreement by a father relinquishing to his wife their infant child was void. "Our own law has never allowed the exercise of such power except for some specific and temporary purpose," such as apprenticeship or guardianship. In *Matter of Murphy*, 13 How. Pr. 513, the Supreme Court, at Special Term, where the parents gave the child at birth to his uncle and aunt, and allowed it to remain with them for nine years, awarded it to the uncle and aunt. "Having (under the verbal gift) performed a parent's duties for nine years, the uncle and aunt, especially when in accordance with the child's interests and inclinations, are entitled to a parent's rights. Those who have borne the cares of the child's earlier infancy should enjoy the comfort of his mature years." On the other hand, in *Wilcox v. Wilcox*, 14 N. Y. 575, the child, when less than a year old, the mother being feeble, and the father poor, was placed with the father's father, and remained there until she was nine years old. Then the father having died, and the mother having acquired ample means, the child was awarded to the mother. The court said: "The fact that the child prefers her grandfather to her own mother and her own sister, is an argument for changing her home, that her affections may be restored to their natural channel," etc. In *Matter of Waldron*, 13 Johns. 417, the child was born at the house of the mother's father, and the mother dying, continued to live there for some two or three years; the father having occasionally visited the wife, but never having visited the child; the grandfather supporting it, and being affluent, while the father was poor, and the child being the only grandchild and prospective heir of the grandfather. The Supreme Court refused to deliver the child to the father on *habeas corpus*, entertaining little doubt that it would be more beneficial for the child to remain with the grandfather, and "leaving the father to pursue his remedy, if any he has, in the Court of Chancery, where questions of this kind more properly belong; there being no actual improper restraint of the infant."

In *Pool v. Gott*, 14 Law Reporter, 269, a case before Chief Justice SHAW, the circumstances were quite similar to those in *Vescer v. Ford*, except that the father delayed applying for thirteen years, having been of pecuniary ability for eight years, and the child preferred to remain with the grandparents. The father's delay, the chief justice

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said, "furnishes reason for supposing that he surrendered his rights over the child, by a tacit understanding, if not by an express agreement. * * * By his own acquiescence, he has allowed the affections on both sides to become engaged in a manner he could not but have anticipated, and permitted a state of things to arise which cannot be altered without risking the happiness and interest of his child. He has allowed the parties to go on for years in the belief that his rights were waived," etc. (Here he applied too late; in *Verser v. Ford*, he applied too soon. He would be troubled to tell exactly when to apply, it seems.) In *Dumain v. Gwynne*, 10 Allen, 270, a wife having separated from her husband on account of his intemperance and imprisonment for felony, being unable to provide for her children, gave her daughter, aged two years, to a charitable institution, to be placed in some good family, for support and education, and agreed to give her up unreservedly. The husband having been discharged, and having acquired some property, and his character and conduct having since been good, he and his wife applied for restoration of the child. The application was denied. The court said: "Without holding that the rights of either parent in respect to the children are absolutely lost, we must nevertheless hold that they are subject to the rights of the other party to the contract above mentioned, it having been freely and fairly made, and being a suitable contract for the wife to make." The court would not even allow a disclosure of the whereabouts of the child, lest "if the former character of the father were made known among the present schoolmates and associates of the child, it might cause annoyance and injury."

In *Sutte v. Richardson*, 40 N. H. 272, the infant daughter had been suffered by her father without objection to reside with and be supported by her uncle for nearly ten years, the mother having died, and the father having remarried. There having been no agreement of transfer, the court held that the father had not waived his parental rights by this acquiescence, and awarded him the child on *habeas corpus*. The court declined to pass on the question whether a bare parol agreement would transfer the custody, but in *State v. Libbey*, 44 id. 321, they held this in the negative, observing however: "It is quite apparent that there may be cases where the father's conduct is such, as by permitting, tacitly or by express agreement, another to assume and discharge for many years the duties of parent to his child, with an understanding that the relation was to be permanent, that he could not afterward attempt to reclaim his child in good faith, nor without subjecting to serious hazard its interests and happiness. In such a case the award of the custody of the child would not be consistent with the exercise of a sound judicial discretion;" but they add, "the court would not be justified in withholding from him that custody," on the ground of a parol gift or agreement for adoption, without formalities of his under it, or probability of jeopardizing the interests of the child.

In *Armstrong v. Stone*, 9 Gratt. 102, the father died, and the mother being left destitute, was obliged to support herself, and during this period their infant daughter was left with the husband's parents, at what age the case does not show. The mother remarried, and when the child was six years old demanded its restoration. The grandparents were aged and somewhat dependent. The mother and her new husband were able to support the child. The application was granted. The court observed: "The conduct of the mother in permitting the child to remain with the defendant whilst she herself was laboring for her own support, does not impair her right to the custody. Owing to the change in her condition, the interest of the child will probably be promoted by the custody being restored to her."

In *Commonwealth v. Ashton*, Philadelphia Quarter Sessions, 8 Week. Notes of Cases, 563, the father brought *habeas corpus* for his two daughters, aged nine and six years, respectively. The respondent was the maternal grandmother, and all the parties had lived together ever since the birth of the elder child, and since the death of the mother in 1877, until nine months before the hearing, when the relator left the common residence, saying the children might remain. There was conflicting evidence as to the support furnished by the father, and as to a promise alleged to have been made by him to his wife to permit the children to remain with the grandmother. The father proposed taking the children to Virginia to visit his mother and sister. The respondent was sixty years old, and was only enabled to clothe the children by the aid of friends. The father was of pecuniary ability and good character, and had always kept up an intercourse with the children until they were concealed by the grandmother, who feared their

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removal. The children preferred to remain with the grandmother. The court denied the application, on the ground that to grant it would "exchange a certainty for an uncertainty." This certainly is a great stretch against the parental right. In *Commonwealth v. Dougherty*, Philadelphia Quarter Sessions, 1 Penn. Leg. Gaz. Rep. 63, the father orally gave his motherless daughter, three years old, to his deceased wife's aunt, he being in the army. On his return from the war he married again, and for six years made no demand for the child, and visited it not oftener than once a year, and did not at any time contribute to its support. The father was a Protestant, the wife's family were Catholics. The father's demand was refused. The court said: "If the father has abandoned his child he has lost all control over its religious as well as temporal welfare." To the same effect is *Com. v. Gilkeson*, Alleghany District Court, 1 Phila. 194, where the father and mother transferred the custody of a daughter, nine years old, to her uncle and aunt, by a written contract, and the father acquiesced in the arrangement for six years, the mother having died. This was affirmed by the Supreme Court.

In *Gardenhire v. Hinds*, 1 Head, 402, a girl, eight years old and frail in health, had been raised principally by the grandmother. The father had no wife or home, and his means were limited. The grandmother had ample means, and was willing to defray the child's expenses. The custody was awarded to the grandmother.

In *Drumb v. Keen*, 47 Iowa, 435, the father, on the death of the mother, sent the son, at the age of three years, to the mother's parents, in conformity with her request, "to raise," and they had it some three years, and a mutual attachment grew up. The court said: "Conceding this offer and acceptance to have the force and effect of a contract, we are clearly of the opinion it does not import that the plaintiff thereby deprived himself of the right to the care and custody of his child for any length of time. It may be admitted such a contract may be made, but certainly it should be clear, definite, and certain." But the father's application was denied on account of the father's lack of means, and of a suitable home, with leave to make another application.

Mr. Schouler says (Dom. Rel. 343): "The general doctrine appears to us, on the whole, to be this: That public policy is against the permanent transfer of the natural rights of a parent; and that such contracts are not to be specifically enforced, except" in the cases of master and apprentice and legal adoption. "American courts hold fast nevertheless to the true interests and welfare of the child." This we think a correct statement.

See generally *Bently v. Terry*, 59 Ga. 555; s. c., 27 Am. Rep. 399; *Clark v. Bayer*, 32 Ohio St. 299; s. c., 30 Am. Rep. 593; *Moore v. Christian*, 56 Miss. 408; s. c., 31 Am. Rep. 375.

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(26 Kans. 682.)

Water and water-course — riparian owner's right to ice in navigable river — judicial notice — statute.

Courts take judicial notice of the navigability of large rivers.

A riparian owner on a navigable stream has no superior right to the ice formed in it opposite his land, but it belongs to the first appropriator.*

A riparian owner on a navigable river owns only to the bank, and his ownership is not extended to the center by a statute declaring the river non-navigable.

* See note, 38 Am. Rep. 255.

ACTION for injunction to restrain cutting ice. The defendant had judgment below.

John K. Cravens, for plaintiff in error.

Leland J. Webb, for defendants in error.

BREWER, J. This is a petition for an injunction. A demurrer thereto was sustained in the District Court and the plaintiffs bring the case here for review. The petition alleges substantially that on the 20th of January, 1880, one Matthias Splitlog was the owner and had the exclusive possession of a tract of land in the neighborhood of Kansas City and Wyandotte, and bordering on the Kansas river and extending to the middle of the channel; that he then leased said tract to these plaintiffs for ten years and placed them in the same exclusive possession; that these plaintiffs are ice dealers, engaged in gathering ice, and that they have erected ice-houses on the banks of the Kansas river, and in close proximity to this tract of land, for the storage and preservation of ice in great quantities; that merchantable ice is a commodity of great value, and the value thereof greatly enhanced as it can be gathered in close proximity to the market; that the cities of Kansas City and Wyandotte furnish a good market for the sale of ice to consumers as well as for export trade; and that merchantable ice of superior quality formed upon the surface of said Kansas river within the limits of said premises, which adhered to the banks of the stream and extended therefrom to the center of the channel. The petition contained further allegations that the defendants were entering the premises and removing the ice, and other facts showing that the plaintiffs were entitled to an injunction if they were the owners of the ice, or if they had such an interest therein that they could prevent any removal of it.

The question then is fairly presented as to the extent of the interest which a riparian owner has in ice formed adjacent to his property. The petition alleges ownership and possession to the center of the channel; but the defendants insist that this allegation must be disregarded because the Kansas is a navigable stream, and that the owner of the adjacent soil in such case only owns to the bank and not to the center of the stream; that this court is bound to take judicial notice of such fact—the official records

of United States surveys showing that the stream was meandered and its navigability being also indicated by early Kansas legislation and its actual navigation a fact of early Kansas history. We think the claim of the defendants is correct — that the court is bound to take judicial notice of the navigability of the stream. Limits of judicial knowledge are perhaps not strictly defined. Greenleaf in his work on Evidence, vol. 1, § 6, sums it up in these words: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." In a note thereto he adds: "There is not much consistency in the cases and possibly this may result from the fact that different judges may assume that what is or is not known to them, is or is not generally known." Returning to the cases we find many that tend with more or less directness to sustain the conclusion we have arrived at. A reference to some may not be inappropriate.

In the *R. R. Co. v. Moore*, 16 Ind. 43, in a suit against a railroad company for damages, it was proved that the accident happened at a certain locality, but it was not proved that such locality was within the limits of the county, and the court took judicial notice of the limits of the county and of the fact that such place proved was within its limits. See also *R. R. Co. v. Case*, 15 id. 42. In the *Lake Co. v. Young*, 40 N. H. 420, it was held that courts take notice of the civil divisions of the State, such as counties and townships, and of its great geographical features, as of large lakes, rivers and mountains. In *Atwater v. Schenck*, 9 Wis. 160, it was ruled that judicial notice would be taken of the government surveys and legal subdivisions of public lands. In *Montgomery v. Plankroad Co.*, 31 Ala. 76, the court took judicial notice that no part of the Tallapoosa river was within the corporate limits of the city of Montgomery. See also *Lewis v. Harris*, 31 id. 689. In *The Peterhoff*, Blatchford's Prize Cases, 463, it was held that the court will take judicial notice of the situation of a town in a foreign country, and that a bar exists at the mouth of the river at which it lies, which vessels of the draught of the vessel libelled cannot cross. In *Mossman v. Forrest*, 27 Ind. 233, it was ruled that courts will take judicial notice of the permanent geographical facts and features of the country. See also *R. R. Co. v. Stephens*, 28 id. 429; *Wright v. Hawkins*, 28 Tex. 452. In *Buchanan v. Whitlam*, 36 Ind. 257, it was held that the court will take judicial notice that the lands in Ripley county were surveyed and laid out by an act of Con-

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gress, and that their sides were east, west, north and south, and that there can be no such description of, or in relation to, a congressional survey of them as the south-east side of a quarter-section. In 1 Greenl. on Ev., § 6, the author, citing several cases, says: "The courts of the United States moreover take judicial notice of the ports and waters of the United States in which the tide ebbs and flows." And further, the exact question in this case came before the Supreme Court of Indiana in *Neaderhouser v. State*, 28 Ind. 257, and there the court, after a full consideration, held that courts will take judicial notice of the navigability of streams, at least so far as the great rivers are concerned. See also *McManus v. Carmichael*, 3 Iowa, 1. Indeed it would seem absurd to require evidence as to that which every man of common information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less known streams; and yet within the limits of any State the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge and take judicial notice thereof; and in taking judicial notice we know that the Kansas is the largest river, wholly within the limits of the State; that it has been recognized as the prominent geographical feature dividing the State into northern and southern Kansas; that in early territorial history it was in fact navigated, a few steamboats going up and down its waters; and that its volume of water is such that in its natural condition it is capable of being used for purposes of navigation, and so coming within the recognized definition in this country of a navigable stream. *The Montello*, 20 Wall. 430; *Booming Co. v. Speechly*, 31 Mich. 336. We know that the lines of the United States surveys do not cross the channel but that the stream was meandered. *Lester's Land Laws*, p. 714. We find among the territorial statutes (Laws of 1857, pp. 166-7), two charters of navigation companies incorporated to engage in the business of navigating the Kansas. It is true in 1864 (Laws 1864, p. 180), an act was passed by the State legislature declaring the Kansas and certain other rivers not navigable; but the plain implication of the act is that the streams had theretofore been considered navigable, and its purpose was to sanction the bridging and damming of such streams. It certainly was not the purpose, and the act had not the effect, to

enlarge the title of the riparian owners or to recognize them as possessed of higher rights than heretofore. Indeed where title is once vested, a mere change in the condition or character of the current or the uses to which the stream is put will not transfer any title. *People v. Tibbals*, 19 N. Y. 527; *Wheeler v. Spinola*, 54 id. 377. It was an assertion of State control over a stream wholly within its territorial limits; a control which notwithstanding the general supremacy of the Federal government over navigable streams, was asserted to exist in the State in the case of *Neaderhouser v. State*, 28 Ind., *supra*, as well as in many other authorities. So that for all the purposes of this case and any question in it we may assume that the Kansas is, at the point in controversy, a navigable stream. The stream having been meandered the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank; Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the State. *Stevens v. R. R. Co.*, 34 N. J. 532; s. c., 3 Am. Rep. 269; *Pollard's Lessee v. Hagan*, 3 How. 212. It is true, a distinction was recognized in England, and that streams were considered navigable only in so far as they partook of the sea, and to the extent that their waters were affected by the ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank; above such point, even although the stream was large enough to be used, and in fact was used for purposes of navigation, the riparian owner owned the soil *ad medium flum aquæ*. So that really three distinct characters of streams were recognized: First, those smaller streams which could not be used for any purpose of navigation, in which the title to the soil was in the riparian owner and along which the public had no rights of highway or otherwise; an intermediate class in which the riparian owner owned to the middle of the channel, but along whose stream the public had all the rights of a highway; and third, that which was called technically the navigable streams, where the title to the bed of the stream was in the sovereign and all rights were in the public. The same doctrine of riparian ownership to the center of the stream in all rivers unaffected by the ebb and flow of the tide is recognized in some States of the Union; but the better and more generally accepted rule in this country is, to apply the term "navigable" to all the streams which are in fact navigable; and in such case to limit the title of the riparian owner to the bank of the stream. Especially is this true in the States where the lands have

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been surveyed and patented under the Federal law. See the following authorities: *R. R. Co. v. Schurmeir*, 7 Wall. 272; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 id. 199; *Tomlin v. R. R. Co.*, 32 id. 106; *Flanagan v. City of Philadelphia*, 42 Penn. St. 219; *Bridge Co. v. Kirke*, 46 id. 112; *People v. Tibbets*, 19 N. Y. 523; *People v. Canal Appraisers*, 33 id. 461. These conclusions seem to compel an affirmance of the judgment of the District Court; for whatever might be the case where a riparian owner owns to the center of the channel, and whatever ownership and control he may have over the ice which forms upon the stream upon his premises (and as to the extent of his rights see the following authorities: *State v. Pottmeyer*, 33 Ind. 402; 5 Am. Rep. 224; *Mill River Co. v. Smith*, 34 Conn. 462; *Marshall v. Peters*, 12 How. Pr. 218; *Myer v. Whittaker*, 55 id. 356; *Higgins v. Kusterer*, 41 Mich. 318; s. c., 32 Am. Rep. 160; *People's Ice Co. v. Excelsior*, 44 Mich. 229; s. c., 38 Am. Rep. 246; *Paine v. Wood*, 108 Mass. 173; *Gage v. Steinkrauss*, 131 Mass. 222; *Washington Ice Co. v. Shortall*, 101 Ill. 46), it would seem that where there is no ownership of the subjacent soil, a riparian owner has no title to the ice. The title to the soil being in the State and the stream being a public highway, obviously the ownership of the ice would rest in the general public or in the State as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish. It is simply this, that his land joins the land of the State. The fact that it so joins gives him no title to that land or to any thing formed or grown upon it, any more than it does to any thing formed or grown or found upon the land of any individual neighbor. Undoubtedly, in view of the importance that ice is rapidly assuming as a merchantable commodity, it would be wise for the State to legislate in reference to the ice product of the navigable streams; but until such legislation is had it would seem that the one who first appropriates and secures the ice which is formed is entitled to it, and on the same principle that he who catches a fish in one of those rivers owns it. *Hickey v. Hazard*, 3 Mo. App. 480; *Gage v. Steinkrauss*, *supra*, and *Rowell v. Doyle*, Mass. Sup. Ct., 25 Alb. L. J. 23.

There being no other questions in the case, the judgment of the District Court will be affirmed.

Judgment affirmed.

All the justices concurring.

KOHNS V. WATKINS.

(36 Kans. 331.)

Negotiable instrument — fictitious payee — fraud.

Where one is induced by the false and fraudulent representations of another to draw a bill to the order of a third person, known to the drawer, and present to his mind at the time as the payee, a *bona fide* transferee cannot recover without the genuine indorsement of such payee, although the payee was ignorant of the transaction.

Where one is induced by false and fraudulent representations to draw a bill to the order of a fictitious person, supposing him to be real, and delivers the bill with the instructions to deliver it to the payee on receiving a mortgage security, and the fraudulent receiver negotiates the bill to an innocent purchaser, the drawer is liable.

ACTION on drafts. The opinion states the case. The defendant had judgment below.

Sluss & Hatton, for plaintiffs in error.

R. J. Brogholthaus, W. J. Patterson and John Hutchings, for defendant in error.

HORTON, C. J. Upon the record of this case two different questions are presented for our decision. The first is, whether a draft or bill of exchange payable to a real person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it is to be paid, must bear the genuine indorsement of such payee in order that a *bona fide* indorsee may recover thereon, when such bill has been drawn without the knowledge or consent of the person named therein as payee, through the false representations of a party forging the indorsement, who obtains it from the drawer by fraud and without consideration? Second, if a drawer be induced by the fraudulent representations of a party seeking to defraud him, to make a draft or bill of exchange payable to a fictitious person, not knowing the payee to be fictitious when he makes the bill, and intending that such bill shall be payable to a real person, may the *bona fide* holder thereof recover on it against a drawer as upon a bill payable to a fictitious payee?

The first inquiry arises upon the findings of the trial court in

relation to the bill payable to the order of Michael A. Becker. It appears that he was a former resident of Kingman county, and therefore a person *in esse*; that his name was forged to an application transmitted to Watkins by G. R. McLain without the knowledge or consent of Becker, asking for a loan of money upon premises purporting to be situated in Kingman county. It further appears that the defendant accepted the application transmitted by McLain, believing it to be genuine, and undertook to loan thereon the sum of \$400, less commissions, and sent McLain a bank note and mortgage together with the draft; that McLain forged the name of Becker upon the draft, indorsed thereon his own name, and negotiated the same, and received from the plaintiffs the money therefor. The plaintiffs received the draft in the usual course of trade, and paid full value. It is argued by counsel for plaintiffs, that as to this draft Becker is to be deemed a fictitious person, because he had no knowledge of the draft, and no interest or concern in it. We do not think the position sound. The statute prescribes that to make a bill of exchange drawn payable to order negotiable, it must contain the indorsement of the person therein named as the payee. (Comp. Laws 1879, ch. 14, § 1.) And we suppose that counsel for defendant will concede, as a general rule, that the plaintiffs could not recover as the indorsees of the note without proving the indorsement of the payee. Now while the authorities hold that when the drawer or maker of a bill of exchange knows that the payee is a fictitious person at the time he makes the draft, a *bona fide* holder may recover on it against him as upon a bill payable to bearer; and while some of the authorities hold that it will be no defense against a *bona fide* holder for the maker or drawer to set up that he did not know the payee to be fictitious, yet none of these authorities sustain the doctrine that if the payee be a real person, and such person was present to the mind of the maker or drawer, when he made the draft, as the party to whose order it is to be paid, a recovery can be had thereon without the genuine indorsement of the payee, upon the mere indorsement of the party who induced the drawer to make the bill by fraudulent representations. Nor can such bill be considered as one running to a fictitious payee, and as if drawn payable to bearer. If the principle contended for by counsel be adopted, it would be wholly immaterial whether the indorsement is genuine or not, so far as to give to the instrument the character of negotiable paper, when the indorser himself is not

actually sued. For it would always be open to the dilemma, if he is a party, it is a genuine indorsement ; if he is not, he is a fictitious payee and no indorsement is necessary. *Dana v. Underwood*, 19 Pick. 99 ; *Rogers v. Ware*, 2 Neb. 29. In our opinion, the indorsement on the draft to Becker is a clear forgery, and the holders, however innocent, cannot recover from the drawer.

The second inquiry presents more difficulty. No such persons as Henry Greer or Geo. W. Cobb, the payees mentioned in two of the drafts, resided in Kingman county, or owned land as purported by the applications transmitted by McLain. These payees are fictitious. The finding upon this matter is, that these applications (for loans) are wholly false and fraudulent, and were manufactured by McLain with the design and for the purpose of obtaining money thereon fraudulently. In the draft to Becker, a real person was inserted as payee at the instance of McLain ; but in the drafts to Greer and Cobb, fictitious names were transmitted by McLain, and such names adopted by the drawer from the applications so received by him from McLain ; and these drafts therefore are not payable to persons *in esse*. Although the defendant made the bills in ignorance of the fact that these parties named as payees had no existence, yet taking all the circumstances of the transaction together, we think the drafts to Greer and Cobb are controlled by the line of decisions respecting bills and notes made payable to fictitious payees. Dan. on Neg. Inst. § 139, says : " In the case of a note payable to a fictitious person, it appears to be well settled that any *bona fide* holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious. By making it payable to such person he avers his existence, and he is estopped, as against the holder ignorant of the contrary, to assert the fiction."

The authority to sustain the rule announced, is *Lane v. Krekle*, 22 Iowa, 399. This authority, so far as the actual points necessary to have been decided in that case, hardly goes so far as the text of the author, because the note in that action was made payable to bearer, and DILLON, J., remarks at the commencement of the opinion, " That this fact relieves the case of some difficulties that would arise were it payable to the person named, or order." Yet that learned judge, in the opinion, presents a strong argument in support of the proposition stated by Daniel. He says :

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“Upon reason and principle we are clear that, if the plaintiff is a *bona fide* holder for value and without notice, the fact that the note is made payable to a fictitious person, is no defense. In such case, the defendant would be estopped, as against the plaintiff, from setting up the fact. It was the defendant who made the note. By making it payable, as he did, he affirmed the existence of such a person as the payee therein named; and he should not, against a person ignorant of that fact — one who may reasonably be presumed to have acted upon the faith of the fact thus represented — be allowed to assert the contrary. This principle of estoppel *in pais* has a very extended and just application in the law of bills and notes, the doctrines of which are designed to give credit and circulation to negotiable paper, and to that end throw its protection around the honest and fair holders thereof. In respect to such a holder, the maker is bound to know that the payee is a real person, or thereafter hold his peace.”

In the case of *Phillips v. ImThurn*, 114 Eng. C. L. 694, the defense was that the payee was a fictitious person, in ignorance of which fact the drawer drew the bill. It was decided by the court that since the drawer would be estopped to set up the fact that the payee was a fictitious name, the like estoppel would apply to an acceptor for the honor of the bill. In *Forbes v. Epsy*, 21 Ohio St. 474, the defendants drew upon their correspondents in New York city in favor of Cochran, Holmes & Co., and by them indorsed to Charles Clark (a fictitious name assumed by one William Mara), and in that name indorsed in blank. Forbes & King became the *bona fide* holders of the draft. It was presented, payment refused by previous directions of the defendants, protested, and due notice given to the defendants. Mr. Justice McILVAINE, speaking for the court, says that the defendants were estopped from denying plaintiff's title. In Chalmers' late Digest of the Laws of Bills of Exchange, p. 144, the law is thus stated: “B., at the request of X., makes a note payable to C.'s order. C. is a fictitious person, but B. does not know this. X. indorses the note in C.'s name, and it is negotiated to D., a *bona fide* holder for value, without notice. D. can sue B. *Cooper v. Meyer* (1830), 10 B. & C. 468; *Beeman v. Duck* (1843), 11 M. & W. 251; *Schullz v. Astley* (1836), 2 Bing. (N. C.) 544.”

Passing from these cases, and the authorities therein cited, to the reasons for these two drafts being held as payable to fictitious

payees, we add, that of course if Watkins had not intended that such payees should become parties to the transaction, or in other words, had knowledge of their non-existence, there could be no question as to error in the judgment of the court below. 1 Para. on Bills, 32, 560, 591, 592, and notes; 2 id. 40, 50; Story on Bills, §§ 56, 200; 4 E. D. Smith, 83. Ought the defendant, who made the bills in ignorance of the fact that the persons named as payees are fictitious, and thus parted with them to a correspondent, to be permitted to aver and prove this as against the innocent holders for value? Either plaintiffs or defendant must lose in this transaction. Watkins transmitted these drafts to his correspondent McLain, and McLain was thereby enabled to fraudulently put them in circulation. If the payees had been known to defendant as fictitious, they could have been treated by McLain as well as the plaintiffs, as bills payable to bearer. Now when a drawer issues a bill to a fictitious payee, although ignorant of that fact at the time, and parts with the possession thereof, ought he in fairness and justice to be allowed to say that such bill is void? "Where one of two innocent parties must suffer from the wrongful or tortious acts of a third party, the law casts the burden or loss upon him by whose act, omission or negligence such third party was enabled to commit the wrong which occasions the loss." *Bank v. R. R. Co.*, 20 Kans. 520. While the finding is, that the defendant was not negligent in making and sending these drafts, and that McLain was not the agent of the defendant in these transactions, it fully appears from the other findings that the drafts were sent to McLain, and that only for the act and conduct of the defendant, induced by the wrongful acts of McLain, these bills would not have been issued and sent forth as commercial paper. To some extent, it must be conceded, defendant, by his conduct as to these bills, placed himself in the hands of his correspondent. For instance, if Greer and Cobb had been in existence, and McLain had passed over to them these drafts without taking back any note or mortgage, it will not be questioned that after Greer and Cobb had indorsed and negotiated them to innocent holders, the defendant could not set up the fraud of these parties as any defense. In this way, if such parties were insolvent, the defendant would have been also absolutely defrauded of his money. So we think, that having relied upon the applications received from McLain for the names of the payees in the drafts issued by him, and two of the payees being

fictitious, and then having transmitted these drafts to McLain, and thus given him the opportunity to put them in circulation, the defendant is not now in a condition to claim that the drafts are void, and to set up as a defense that he did not know such payees to be fictitious. He acted upon the information derived from McLain; he is bound by McLain's knowledge, and must be conclusively presumed, as against the innocent holders for value, to have known that these two drafts are payable to fictitious payees. He can no more set up the fraud of McLain as to these two drafts, than he can the fraud of Greer and Cobb, had there been such persons actually existing in Kingman county, and they had obtained these drafts from McLain without complying with the request of the drawer as to the execution of the notes and mortgages, and then indorsed and negotiated them to innocent holders.

Counsel for defendant refer to cases making the indorsement by McLain upon the bills at the time he delivered them to plaintiffs a forgery. Even if this be so, we do not think it prevents the recovery by plaintiffs, because the principle of estoppel *in pais* is to be applied to the defendant, and as between the plaintiffs and the defendant these drafts are to be treated as if drawn payable to bearer. The case will be remanded, with directions for the court below to render judgment upon the findings of fact for plaintiffs upon the drafts payable to Greer and Cobb, and judgment for the defendant upon the draft payable to Becker.

All the justices concurring.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

STATE V. JACKSON.

(3 Me. 91.)

Criminal law — bribery.

Bribery or attempt at bribery of an elector is a crime at common law, and so is an offer to pay him money for giving in his ballot.

INDICTMENT for bribery. The opinion states the case. The plaintiff had judgment below on demurrer.

A. P. Gould, for defendant.

Henry B. Cleaves, attorney-general, and *J. O. Robinson*, county attorney, for State.

LIBBEY, J. This is an indictment against the defendant for unlawfully and willfully attempting to influence a qualified voter to give in his ballot at a municipal election, in the city of Rockland, by offering and paying him money therefor.

The offense charged is not within R. S., ch. 4, § 67.

State v. Jackson.

Is bribery at a municipal election a misdemeanor at common law in this State? It is claimed by the learned counsel for the defendant, that it is not recognized as such in this country. We think it is. It was an offense at common law in England. 1 Russell on Crimes, 154; *Plympton's case*, 2 Ld. Raym. 1377; *Rex v. Pitt*, 3 Burr. 1335.

The common law of England upon the subject of bribery, fraud and corruption at elections, is generally adopted as the common law in this country. *Comm. v. Silsbee*, 9 Mass. 417; *Comm. v. Hozey*, 16 id. 385; 1 Bish. Crim. Law, 355; *Walsh v. People*, 65 Ill. 58; s. c., 16 Am. Rep. 569; *State v. Purdy*, 36 Wis. 224; s. c., 17 Am. Rep. 485; *State v. Collier*, 72 Mo. 13; *People v. Thornton*, 25 Hun, 555; *Com. v. McHale*, 97 Penn. St. 397; s. c., 39 Am. Rep. 808.

Bishop in his work on Criminal Law, vol. 1, § 922, says: "We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law."

PAXSON, J., in the opinion of the court in *Com. v. McHale*, *supra*, says: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they affect the public policy or economy. It needs no argument to show that the acts charged in these indictments are of this character. They are not only offenses which affect public society, but they affect it in the gravest manner. An offense against the freedom and purity of the election is a crime against the nation. It strikes at the foundation of republican institutions. Its tendency is to prevent the expression of the will of the people in the choice of rulers, and to weaken the public confidence in elections. When this confidence is once destroyed, the end of popular government is not distant. Surely if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, the offense which involves the right of a free people to choose their own rulers in the manner pointed out by law is not beneath the dignity of the common law, nor beyond its power to punish. The one is an annoyance to a small portion of the body politic, the other shakes the social fabric to its foundations."

We have no doubt that bribery at a municipal election is a misdemeanor punishable by the common law of this State.

An attempt to bribe or corruptly influence the elector, although not accomplished, will subject the offender to an indictment. *State v. Ames*, 64 Me. 386.

But admitting that attempting to bribe an elector at a municipal election is an offense at common law, it is claimed by the counsel for the defendant that the indictment in this case does not properly charge such offense.

1. It is claimed that willfully and unlawfully attempting to influence an elector to give in his ballot, by offering or paying him money therefor, is not criminal. We think it is. What the law deems criminal and seeks to prevent is the corrupting of the elective franchise. Every elector not only has the right to vote or not to vote, according to his own judgment of duty, but he has an interest that every other elector shall exercise the franchise in the same manner, without being influenced by the corrupt payment of money, or other unlawful means. If the elector determines that under all the circumstances it is not his duty to vote, but is induced to cast his ballot in the election by the corrupt payment of money, the ballot does not represent the free and unbiassed act of the elector, but it represents the money paid for it; and when counted neutralizes the ballot of the honest voter. When such corrupt influences are used, the result of the election does not depend upon the honest, uncorrupted judgment of the electors, but upon the amount of money paid to corrupt them. It is an offense against the people, and has been so regarded in England as well as in this country.

Plympton's case, *supra*, was an information at common law, for offering an elector money to induce him to cast his vote for mayor. The statute of 2 Geo. 2, ch. 24, § 7, declares it an offense for any elector to "ask, receive, or take money or other reward, by way of gift, loan, or other device * * * to give his vote," "or to refuse or forbear to give his vote in any such election, and any person who by such means shall corrupt or procure any elector to give his vote, or to forbear to give his vote in any such election, shall be equally guilty with the elector. It was held that this statute was merely an affirmation of the common law, and did not take away the common-law crime. *Rex v. Pitt*, 3 Burr. 1335.

The statute of 5 and 6 Wm. 4, ch. 76, § 54, in regard to the election

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of mayor, or of a councillor, auditor or assessor of any borough, uses terms similar to the statute of 2 Geo. 2.

The form of an indictment under the statute of Massachusetts, given by Train and Heard (*Precedents of Indictments*, 185), is the same upon the point under consideration, as the indictment in this case.

2. It is further objected that it is not alleged in the indictment that a legal meeting of ward one in Rockland was held; nor for what city one alderman and three councilmen were to be elected; nor that Augustus Montgomery was a legal voter in the same ward one in which the meeting was held. But on a careful examination of the indictment, we think the allegations sufficient on each of these points. *State v. Bailey*, 21 Me. 62; *State v. Boyington*, 56 id. 512.

Exceptions overruled; judgment for the State.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and PETERS, JJ., concurred.

REDLON V. CHURCHILL.

(73 Me. 146.)

Negotiable instrument — when binding partnership.

Where one partner makes his own note to his own order, and indorses it individually, and in the firm name, to an innocent purchaser, appropriating the proceeds to his own use, the firm will be liable thereon to the holder.*

ACTION on a promissory note. The opinion states the case.

Clarence Hale, for Holman S. Melcher, defendant.

George W. Verrill, for plaintiff.

APPLETON, C. J. This is an action of assumpsit against the defendants as indorsers of the following described note :

*See *Sherwood v. Snow* (46 Iowa, 485), 23 Am. Rep. 185; *Mech. and Traders' Ins. Co. v. Richardson* (33 La. Am. 1306), 39 Am. Rep. 220.

“ PORTLAND, *September 29, 1880.*

“ \$200.00.

“ Four months after date I promise to pay to the order of myself two hundred dollars at any bank in Portland. Value received.

No. 2672. Due January 29.

GEORGE L. CHURCHILL.”

Indorsed on the back of the note is,

“ GEORGE L. CHURCHILL.”

“ CHURCHILL & MELCHER.”

The note not being paid at maturity was protested, and the defendants were seasonably notified.

The defense set up was, that Churchill made the note and the indorsements thereon, and obtained the money on the note for his own use, and without the knowledge or consent of his partner.

The evidence shows that the plaintiff purchased the note before its maturity of a broker, and paid for the same in good faith, and ignorant of any facts affecting its validity.

The general rule, as laid down in *Collier on Partnership*, § 447, is, “that a partnership security, negotiated through the fraud of one of the partners, is nevertheless binding on the firm, in the hands of an indorsee for a valuable consideration without notice of the fraud.” The evidence clearly shows the plaintiff to be such indorsee.

The remarks of LORD, J., in the *Atlas National Bank v. Savery*, 127 Mass. 75, are applicable to the case at bar: “The notes were obtained by the plaintiff in the market, with no evidence that the party from whom they were obtained was not a *bona fide* holder of them for value. The fact that the party from whom they were obtained was a broker, if from that fact it is to be inferred that he was not the owner, raises no presumption that he was the agent of Law (here Churchill), for the negotiation of the notes. If any presumption could arise from that fact that he was the agent to any party to the notes, it would be that he was the agent of the last indorser of the notes.” So that if the broker was not the owner of the note, the inference would be that he was the agent of the defendants—the last indorsers—who would in that case be indisputably liable.

When one of a firm makes his own note payable to his own order, and indorses thereon the name of his firm, and receives and

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appropriates to his own use the proceeds thereof, the firm being duly notified, will be liable therefor to an indorsee, who in good faith, for an adequate consideration, purchased the same before maturity, and in ignorance of any circumstances affecting its validity. The form of the note is not notice that the note is given for the maker's accommodation. In *Wait v. Thayer*, 118 Mass. 474, one Warner made and indorsed a note payable to the firm of which he was a member, for his own use. In delivering the opinion of the court, WELLS, J., says, "Warner being a member of the firm whose indorsement appeared upon the note, the fact that he was also the maker of the note in his individual capacity did not give rise to any conclusive presumption, that it was an accommodation indorsement, or that he negotiated the original loan, and received the money for his own private use, and as a copartner." In *Parker v. Burgess*, 5 R. I. 277, a note made by a copartner, payable to his own firm, was indorsed by him in the copartnership name to another in payment of his individual debt, with notice that he had no authority to use the firm name, and the note indorsed by the party, who received it in blank, was purchased by the plaintiff from a broker before maturity, for full value, and without notice of the transaction in which the note originated. *Held*, that the plaintiff was entitled to recover of the firm, as indorsers, the amount of the note, the paper not indicating, and he having no notice of the fraud practiced upon the firm by its copartner. The form of the note is no notice of an intended or accomplished fraud on the firm by one of its members. These views have long since received the sanction of this court. *Waldo Bank v. Lumbert*, 16 Me. 416; *Waldo Bank v. Greeley*, 16 id. 419.

That Churchill made the note payable to his own order, and then indorsed the name of the firm cannot change the result. It is immaterial whether the note was made originally payable to the firm, or the maker's order and then indorsed with the firm name.

It is sufficient that the plaintiff is a purchaser for value, in good faith, and without knowledge of any defect of title. A suspicion of defect, or a knowledge of facts which might excite in the mind of a cautious person, or even negligence not amounting to fraud or bad faith will not defeat the rights of the purchaser. Such is the universally recognized law on this subject. *Farrelli*

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v. *Lovett*, 68 Me. 326; s. c., 28 Am. Rep. 59; *Kellogg v. Curtis*, 69 Me. 212; s. c., 31 Am. Rep. 273; *Hobart v. Penny*, 70 Me. 248; *Smith v. Livingston*, 111 Mass. 342; *Freeman's National Bank v. Savory*, 127 id. 79; s. c., 34 Am. Rep. 345; *Murray v. Lardner*, 2 Wall. 110; *Cromwell v. Sac Co.*, 96 U. S. 51.

Defendants defaulted.

WALTON, BARROWS, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.

BUTLER v. MOORE.

(73 Me. 151.)

Fraud—estoppel.

One who executed his note, in consideration of a conveyance accepted by him to aid the grantor in defrauding his creditors, cannot avoid it on the ground of its illegality.*

ACTION on a promissory note. The head-note and opinion show the facts. The plaintiff had judgment below.

G. C. Seaton and *H. V. Moore*, for plaintiff.

Copeland & Edgerly, for defendant.

VIRGIN, J. One view of the facts in this case as they are testified to by the defendant, that in receiving the deed from Marshall he did not intend any wrong, that he never expected to pay the note when he gave it to Marshall as a consideration for the deed, that it was distinctly understood that it was not to be paid and that the deed was to be given back, is so like those in *Bryant v. Mansfield*, 22 Me. 360, as to render the language of the court in the latter case peculiarly apt here. "If the transaction," says SHEPLEY, J., "be considered with reference to the parties alone, it presents the case on paper of conveyance of real estate and a payment for it by note, with an alleged verbal agreement that the note should be returned to one party and the estate be reconveyed to the other. And such a parol agreement to destroy the effect of the deed of conveyance and of the note could no more be received in equity than in law."

* See *Bush v. Rogan* (65 Ga. 339), 38 Am. Rep. 735.

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Again, taking the testimony of the defendant to be true, there was no such fraudulent conveyance as even creditors of Marshall could impeach. For the defendant unqualifiedly denies all wrongful intent on his part in accepting the deed from Marshall and giving him his note. Nor is there any evidence of Marshall's indebtedness to any creditor. And whatever the original transaction may have been, the defendant has never been solicitous to rescind the contract. The parties being tenants in common after the conveyance caused it to be taxed to them both ever after, and each paid one-half of the taxes as they were assessed. In 1876 they sold a house lot, they both agreeing upon the price and dividing the sum received therefor; and in like manner they sold three other house lots, thus disposing of three of the ten acres. We perceive no fraud upon creditors or upon each other here. At any rate no creditor has ever undertaken to disturb the defendant's title, which is still in him except as to the portion sold.

There is still another view of the case. Assuming the note in suit to have been dishonored before it was indorsed to the plaintiff, and taking the same view of the testimony as the court did in *Bryant v. Mansfield*, *supra*, that and the defendant's second plea presents the question: Whether one who has received a conveyance of land and in consideration thereof has given his negotiable promissory note to the grantor, for the purpose of aiding him in delaying his creditors, can set up the fraud in defense to an action on his note brought by the grantor. And after a careful examination of the numerous cases on the subject in the various jurisdictions where it has been considered, we think the better opinion is opposed to such defense.

We derive our law in relation to conveyances fraudulent as to creditors, from the stat. 13 Eliz., ch. 5, which has been adopted here as common law. *Howe v. Ward*, 4 Me. 196, 199. This statute, declaring that conveyances made with intent to "delay, hinder or defraud creditors," shall be "deemed and taken (only as against creditors, etc.) to be clearly and utterly void, frustrate and of none effect," has been invariably construed as plainly implying that they are valid as between the parties and their representatives (*Nichols v. Patten*, 18 Me. 231; *Andrews v. Marshall*, 43 id. 274; Benj. on Sales, 3d Am. ed., 476 and note); and can be avoided only by creditors on due proceedings (*Miller v. Miller*, 23 Me. 22; *Thompson v. Moore*, 36 id. 47; *Stone v. Locke*, 46 id. 445); or their representa-

tives, such as assignees in bankruptcy or insolvency of the grantor (*Freeland v. Freeland*, 102 Mass. 475, 477), and the executors or administrators of grantors since deceased whose estates have been declared insolvent. *McLean v. Weeks*, 65 Me. 411, 418. And notwithstanding the words "utterly void," etc., applied to such conveyances, they are not, even as to creditors, void but voidable. *Andrews v. Marshall*, *supra*. And all the courts concur in holding that if the fraudulent grantee convey the premises to a *bona fide* purchaser, for a valuable consideration, before the creditor moves to impeach the original conveyance, the purchaser's title cannot be disturbed. *Neal v. Williams*, 18 Me. 391; *Hoffman v. Noble*, 6 Metc. 68; *Bradley v. Obeur*, 10 N. H. 477.

It is generally true that the law will not aid parties violating its express or implied rules, in executing their unlawful contracts, or afford them relief from their effects when executed. In such cases the old maxims, *ex turpi causa* and *in pari delicto*, stand like walls against the parties. The implication of the statute of 13 Eliz. declares that as between the parties to a conveyance made to prevent creditors of the grantor from attaching or seizing his property and thereby securing their debts, the transaction is not to be regarded void or voidable, but valid. And if valid we fail to see why the note given in payment is not also valid. The transaction is not a *turpis causa*, and neither do the parties stand *in pari delicto*. In the case at bar each of the parties deliberately entered into the contract. Each received a full consideration, the one for his land and the other for his note. Neither of them was defrauded. So far as their intention backed up by their acts affected any creditor of the grantor, the creditor thereby defrauded has full remedy; for he may attach the property before it is sold to a *bona fide* purchaser, or he may recover twice its value not exceeding twice the amount of his debt in an action on the case under the provisions of R. S., ch. 113, § 51.

The decisions in Massachusetts, repeatedly made, sustain actions like this. See the two opinions of MORTON, J., and of SHAW, C. J., after the second trial in *Dyer v. Homer*, 22 Pick. 253; *Butler v. Hildreth*, 5 Metc. 49, 50. *Bailey v. Foster*, 9 Pick. 139, recognizes the same doctrine. See also, *Harvey v. Varnoy*, 98 Mass. 118, where the cases are reviewed and the doctrine adhered to. See also, the elaborate opinion of the chief justice of Wisconsin in *Clemmens v. Clemmens*, 28 Wis. 637; s. c., 9 Am. Rep. 520; and the

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well-seasoned opinion of the court in *Carpenter v. McClure*, 39 Vt. 9. See also the numerous cases cited on the plaintiff's brief.

We are aware that the early decisions in our own State are somewhat inconsistent. *Smith v. Hubbs*, 10 Me. 71; *Nichols v. Patten*, 18 id. 231; *Ellis v. Higgins*, 32 id. 34; *Andrews v. Marshall*, *supra*; s. c., 48 id. 26. But in none of these cases was this precise question presented; although it was discussed. We think however the better doctrine is the one held by the cases above cited.

In *Ellis v. Higgins* and *Andrews v. Marshall*, 48 Me. 26, the question was raised (though not by counsel in this case) as to the effect of R. S., ch. 126, § 2, which makes parties to a conveyance fraudulent as to creditors liable to fine and imprisonment, and is therefore prohibitory in its character. And it was decided that it did not make such conveyances void as to parties. This provision first came into the statute in 1841, R. S., 1841, ch. 161, § 2. It is substantially a transcript of Stat. 13 Eliz., ch. 5, § 4, and hence was common law here before it was adopted by the legislature. The two rules should be construed together now the same as if both were statute provisions, or both rules of the common law, and the construction given them to harmonize them so that they both shall stand, which results from holding that while one impliedly prohibits conveyances fraudulent as to creditors, the other limits or restricts the invalidating effect of the prohibition to the creditors or their representatives whose debts are attempted to be avoided. *Carpenter v. McClure*, *supra*, where the statute of Vermont having both sections of 13 Eliz., ch. 5, is discussed and construed.

We perceive no legal reason for deducting from the amount of the note the sum of \$425 received for sales of the four lots of land.

Judgment for the plaintiff for the amount of the note sued on.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and SYMONDS, J.J., concurred.

WILLIAMS V. ROBINSON.

(73 Me. 188.)

Frauds — statute of — memorandum, sufficiency of.

A memorandum signed by A. alone, whereby he agrees to furnish B. with a specified quantity of ice, at a specified price per ton, but not specifying time of delivery or of payment, is sufficient under the statute of frauds, and not to be varied by parol proof of the agreement for particular time of delivery or payment.*

ACTION of damages for breach of contract, running as follows:

“AUGUSTA, June 8, 1880.

“I hereby agree to furnish M. F. Williams of New Haven (post-office address West Haven) eight hundred to one thousand tons of ice, delivered on board vessels at Augusta, Maine, properly packed for a voyage to New Haven, for the sum of two dollars per ton.

BOND BROOK ICE COMPANY,

J. E. ROBINSON, Augusta, Maine.”

The defendant, having introduced testimony tending to prove the facts assumed in the following requests, asked the court to instruct the jury as follows :

1. “That if the jury found it was agreed upon by the parties that the ice was all to be delivered by the last of July, the memorandum introduced by the plaintiff not containing such a stipulation, it was sufficient, and the plaintiff cannot recover.”

2. “That if the jury was satisfied from the evidence that the forwarding a draft for the sum of seven or eight hundred dollars by the plaintiff immediately upon his return to New Haven, and before any ice was shipped, was one of the conditions of the bargain, the memorandum relied upon was insufficient, and the plaintiff could not recover.”

3. “That if the jury find that the ice was to be delivered by successive shipments, at different times, and that a draft for a sum covering any such shipments was to be sent before any such shipment was made,—no such condition or stipulation appearing

* See *Steel v. Flye* (48 Iowa, 90), 30 Am. Rep. 388; *Mason v. Decker* (72 N. Y. 595), 28 Am. Rep. 190.

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in the memorandum, it is insufficient, and the plaintiff cannot recover."

These were refused. The plaintiff had judgment.

Baker & Baker and *L. C. Cornish*, for plaintiff.

S. & L. Titcomb, for defendant.

VIRGIN, J. At common law, mutual executory contracts for the sale and purchase of goods, wares and merchandise, of whatever value, and however provable, were binding and enforceable. The statute of frauds intervened and prescribed the kind of evidence by which alone they might be established, by entailing upon the parties of certain specified classes of contracts the disability of enforcing them so long as their essential terms remained in mere unwritten words. The statute did not declare such contracts illegal, or void, but simply said they should not be actionable, with certain exceptions, unless evidenced by written evidence.

Thus the section invoked by this defendant provides, in substance, that when an oral executory contract for the sale and purchase of goods, wares and merchandise, valid at common law, involves property of the value of thirty dollars or more, and the purchaser receives and accepts no part of it, nor gives any thing by way of earnest or in part payment thereof, it shall not be valid for the purpose of enforcement, unless some note or memorandum thereof be made and signed by the party to be charged thereby, or by his agent. R. S., ch. 111, § 4. The "note or memorandum" of the contract cannot, of course, be the contract itself, but the evidence by which it is to be proved, if the defendant requires it, in the trial of an action at law brought to recover damages for its breach, or of a bill instituted to enforce specific performance. *Lawrence v. Chase*, 54 Me. 196; *Bird v. Munroe*, 66 id. 337, 343, 344; s. c., 22 Am. Rep. 571; *Middlesex Co. v. Osgood*, 4 Gray, 447.

The memorandum need be signed by one only of the parties — the party to be charged. *Barstow v. Gray*, 3 Me. 409; *Getchell v. Jewett*, 4 id. 350, 366; or by both, *Atwood v. Cobb*, 16 Pick. 227 (26 Am. Dec. 657); or counterpart memoranda may be made and signed by the respective parties. *Small v. Quincy*, 4 Me. 497. So that if a mutual oral executory contract, valid at common law, be

made, and one of the parties obtain from the other the "note or memorandum" thereof contemplated by the statute, but does not give a corresponding one, he may enforce it, although the other cannot, the former having secured, while the other has not, the evidence which the statute has made indispensable to its enforcement. *Rogers v. Saunders*, 16 Me. 92, 97 (33 Am. Dec. 635); *Laythoarp v. Bryant*, 2 Bing. N. C. (29 E. C. L.) 469.

At common law, while every simple contract, whether oral or written, must be founded on a legal consideration, it need not be expressed in the writing itself, for parol evidence is admissible to prove it. *Cummings v. Dennett*, 26 Me. 397; *Bean v. Burbank*, 16 Me. 458 (33 Am. Dec. 681). Nor did the statute of frauds, even before the amendment expressly declaring it unnecessary, ever require the consideration to be recited in the note or memorandum signed by the party to be charged. *Packard v. Richardson*, 17 Mass. 122 (9 Am. Dec. 123); *Levy v. Merrill*, 4 Me. 180, 189; *King v. Upton*, id. 387 (16 Am. Dec. 266); *Getchell v. Jewett*, 4 Me. 350, 366; *Gilligan v. Boardman*, 29 id. 81. In *Bean v. Burbank*, *supra*, and *Vantassel v. Hathaway*, 53 Me. 18, no acceptance of the contract or other consideration was attempted to be proved. The distinction between §§ 4 and 17 of the Stat. 29 Car II, ch. 3, corresponding to R. S., ch. 111, §§ 1, 4, set up in the English courts, and followed by some of the courts of some of the States, was never recognized in this State, the question having been settled in Massachusetts in *Packard v. Richardson*, *supra*.

But while, as before seen, the memorandum need not necessarily mention the consideration, that being provable by parol testimony, nevertheless in order that the court may ascertain the rights of the parties from the writing itself without resort to oral testimony (*Riley v. Farnsworth*, 116 Mass. 223, 225, 226), to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, if any, without any aid from parol testimony. (*O'Donnell v. Leeman*, 43 Me. 158; *Jenness v. Mt. H. I. Co.*, 53 id. 20; *Horton v. McCarty*, 53 id. 394, 396; *Washington I. Co. v. Webster*, 62 id. 341; s. c. 16 Am. Rep. 462. And when a memorandum is made and signed, and delivered between the parties as and for a complete

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memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties and parol evidence is incompetent to contradict or vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them. *Small v. Quincy*, 4 Me. 497; *Coddington v. Goddard*, 16 Gray, 436; *Hawkins v. Chace*, 19 Pick. 502; *Ryan v. Hall*, 13 Metc. 523; *Warren v. Wheeler*, 8 id. 97; *Cabot v. Winsor*, 1 Allen, 546, 551; *Remick v. Sandford*, 118 Mass. 102, 106; 2 Whart. Ev., § 901, and notes.

Such is the general rule governing written contracts; and the statute of frauds leaves it together with its exceptions as it found them. Benj. Sales, § 205.

By the enactment of this statute, the legislature interposed a few safeguards against mistakes and frauds in certain kinds of contracts, by making certain additional things indispensable to the remedy. The security thereby afforded makes the remedy depend upon proof which shall not rest upon the recollection or integrity of witnesses, but upon something reliable, to which the parties may resort for a solution of all their doubts and disputes, the signature thereto serving, *inter alia*, to identify the evidence by which the signer is to be bound. And when a memorandum, like the one now before us, has been deliberately made, executed and delivered in conformity with the statute, and its terms are sensible and free of all ambiguity, it cannot be varied as to its substance by parol; otherwise the great purpose of the legislature would be thwarted.

Applying these principles to the case at bar, and the exceptions, so far as the question of consideration and the three requested instructions are concerned, must be overruled.

The jury must have found under the charge, that the memorandum was made, signed and unconditionally delivered by the defendant to the plaintiff, as and for a complete memorandum of the contract, so far as the matters contained in the request go, and that the consideration was proved. Its terms are clearly expressed, and contain all the elements necessary to give it legal effect as a written contract.

[Omitting a minor question.]

Exceptions overruled.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and SYMONDS, JJ., concurred.

SMART V. WHITE.

(37 Me 322.)

Pension—excessive fee recovered back—agency.

Where an agent takes from a pensioner a fee in excess of the statutory allowance for obtaining his pension money, the pensioner may recover the excess from him, although both parties acted innocently and the agent has paid the amount to his principal.

ACTION for money had and received. The opinion states the facts. The plaintiff had judgment below.

P. G. White, for plaintiff.

Barker, Voss & Barker, for defendant.

PETERS, J. Section 5485, U. S. R. S., provides thus: "Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation, for his services or instrumentality in prosecuting a claim for pension or bounty land, than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant, shall be guilty of a high misdemeanor, and upon conviction thereof, shall for every such offense be fined not exceeding five hundred dollars, or imprisonment at hard labor, not exceeding two years, or both, at the discretion of the court." Another provision of the Federal statutes prohibits any sale, pledge or assignment of any claim, right or interest in any pension which has been or may be granted, pronouncing all such transfers void.

The plaintiff, who was entitled to a pension, had been supported by the town of Levant as a pauper. The defendant, an overseer of the poor of the town, assisted her to obtain her pension, under a verbal agreement with her, he said, that whatever back pay might be received should be applied toward her indebtedness to the town for her support. The verdict finds the fact, that the defendant got the back pay from her, under and by force of the contract, ex-

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cepting that he allowed her to retain fifty dollars of the amount, to induce her to carry the contract (with that variation) into effect.

The presiding judge in his charge had ruled substantially, that the plaintiff had a legal right to dispose of the pension check or its proceeds as she saw fit; that she could voluntarily pay with it her indebtedness to the town; that although the agreement was not binding upon her, still if she concluded to carry out the agreement, and without fraud or duress paid the money to the town, the payment would be binding upon her; but that if the defendant obtained the money from her by means of the contract, without her knowing that she was not compelled to pay it over, then the payment would not be binding upon her, and the money could be recovered back. Thereupon the defendant requested the court to give the following ruling to the jury: "If the jury find that this money was paid voluntarily by Mrs. Smart to John White, as one of the overseers of the poor for the town of Levant, without fraud or duress, even though paid by mistake, and he paid it over to the town of Levant before receiving notice from her that she claimed to recover it back, then he is not personally responsible to the plaintiff." This request was properly refused.

The defendant's counsel must have intended by the phrase, "paid by mistake," a mistake of law, meaning to assert the proposition that the money could not be recovered back, if she paid it in fulfillment of the contract by a mistake of law upon her part; that is, an ignorance upon her part that such a contract was illegal and void.

It cannot be pretended that the defendant should be shielded by any plea of an ignorance of the statute upon his part. It matters not that he intended no wrong or injury and practiced no duress, and knew not of the statute. The statute does not make the actual intention of its violator an element of the offense. It does not prescribe the penalty against a person who shall fraudulently contract for and receive for services a greater share of a pension than the law allows. Taking the excessive sum is *per se* an unlawful and punishable act. It is well settled upon the great weight of authority, that in merely statutory offenses, of which a morally wrong intent is not a necessary ingredient, guilty knowledge or intent is not necessary to be either alleged or proved, where the statute creating the offense evidently dispenses with such necessity. The statute in

question is founded upon a policy of Federal government to protect a class of persons who might be incompetent fully to protect themselves, and it must necessarily be very absolute and rigorous in order to be effective. *State v. Smith*, 65 Me. 257; *State v. Goodenow*, id. 30; *Com. v. Railroad*, 112 Mass. 412, and cases cited. See 12 Am. Law Rev. 469, where the question before stated is elaborately discussed and the authorities collected.

But the plaintiff stands in a different attitude. If her pension money was taken from her through a contract declared to be void by the statute, she can have its restoration. She would be entitled to recover it back, even had she known the law, and *a fortiori* entitled, not knowing it. The parties do not stand *in pari delicto*. The penalty of the statute is levelled at him and not at her. The punishment is to be inflicted upon the taker and not upon the giver. She is to be protected, not punished. Her ignorance of the law, or her folly if not ignorant of it, is excusable, but his is not. He commits a wrong; she does not. She cannot defraud herself. The statute would be nullified by a different interpretation.

The principle that where the offense is merely *malum prohibitum*, and not in itself immoral, a person may recover back money paid under an illegal contract to the party who is wholly or principally the wrong-doer, runs through a long line of decisions which bear more or less analogy to the present case. The case at bar is a stronger case for the application of the principle than most of them. In *Smith's Cont.* 204, it is said there is an exception to the rule or maxim, *in pari delicto, potior est conditio defendentis*, "where the illegality is created by some statute, the object of which is to protect one class of men against another, or where the illegal contract has been extorted from one party by the oppression of the other." And it is there further said: "In cases of this sort, although the contract is illegal, and although a person belonging to the class against whom it is intended to protect others cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the act more efficacious." The English cases quoted by the author to illustrate the principle are many and various. In *Smith v. Cuff*, 6 M. & S. 160, Lord ELLENBOROUGH says: "This is not a case of *par delictum*, but of opposition on one side, and submission on the other; it can never be predicated as *par delictum*, when one holds the rod, and the other bows to it; there was an inequality of situation between the parties."

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In *Curtis v. Leavitt*, 15 N. Y. 9, it was held that "where a contract otherwise unobjectionable is prohibited by a statute, which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and upon disaffirming the contract, may recover, as upon an implied assumpsit, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract." Other New York cases are to the same effect. *Schermerhorn v. Talman*, 4 Kern. 93, and *Tracy v. Talmage*, id. 162, are to the same point, and contain copious citations of analogous cases. Benj. on Sales (3d Am. ed.), § 509, note c, and cases cited.

In *White v. Franklin Bank*, 22 Pick. 181, where a plaintiff had deposited money in a bank, repayable at a future day, in violation of a statute of Massachusetts, he was allowed to recover back the deposit, upon the ground that although both parties were culpable, the defendants were the principal offenders. The court there said that to deny the action would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to take an advantage of the unwary and those who had no knowledge of the law or the illegality of such transaction. In *Lowell v. Boston and Lowell R. R. Co.*, 23 Pick. 24 (34 Am. Dec. 33), the same doctrine is restated and reaffirmed, as applicable to another class of facts. In *Atlas Bank v. Nahant Bank*, 3 Metc. 581, 585, the same court, speaking of the decision in *White v. Franklin Bank*, says: "To have decided otherwise would have given effect to an illegal contract, in favor of the principal offender, and would have operated as a reward for an offense which the statute was intended to prevent." In *Walan v. Kerby*, 99 Mass. 1, in construing an act relating to the sale of intoxicating liquors, the court say: "The seller and buyer of intoxicating liquors sold in violation of law are not *in pari delicto*, because the latter is guilty of no offense. When the purchaser seeks to recover back the price he has paid, the illegality of the transaction, of which he offers evidence, is wholly on the part of the defendant, and he himself is not *particeps criminis*."

Other illustrations of the principle are found in many other cases. The doctrine is commented upon in *Concord v. Delaney*, 58 Me. 316; is considered in Connecticut in the case of *Cameron v. Peck*, 37 Conn. 555; and elaborately discussed in New Hampshire, in the cases of *Prescott v. Norris*, 32 N. H. 101, and *Butler v. Northumberland*, 50 id. 33, 39.

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If then there was such a contract between the plaintiff and the defendant as before stated, it was illegal and void, and the defendant is not allowed to deny that he knew it to be illegal and void. He would be the principal if not the sole offender in the transaction. If the plaintiff assented to the payment under and by force of the contract because she was mistaken as to her legal rights, and did not know of the protection vouchsafed to her by the statute, she was defrauded. In this view the different terms of the requested instruction are repugnant to each other. They are tantamount to this rendering: "If paid without fraud or duress, excepting such as may arise from the illegality of the transaction, he knowing and she not knowing that the contract was in violation of law." But that would be a fraud. The requested instruction was therefore self-contradictory — a *felo de se*.

The defendant cannot be screened from liability because he paid the money to the town before notice to pay back. The money was illegally in his hands. The rule of *respondet superior* does not apply. The defendant was the active and efficient party in perpetrating the wrong complained of. *Call v. Houdlette*, 70 Me. 308, and cases.

[A minor matter omitted.]

Motion and exceptions overruled.

APPLETON, C. J., BARROWS, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

WYMAN V. ROBINSON.

(73 Me. 384.)

Interest — recoverable on penalty of bond.

Interest may be recovered on the penalty of a bond.*

ACTION on a bond. The opinion states the case. Case reserved.

G. T. Stevens, for plaintiff.

H. M. Heath, for defendants.

*See *Graham v. Bickham*, 2 Yates, 32 (1 Am. Dec. 336).

PETERS, J. The important question presented by this case is, whether in an action upon a replevin bond against principal and sureties, when damages exceed the penalty of the bond, the recovery must be limited to the penalty, or whether it may exceed the penalty so far as to include interest upon the amount of the same from the date of the breach of the bond. We think the reasonable doctrine to be, that so far as necessary to secure the damages sustained by the obligee, the recovery may go beyond the sum of the penalty, by allowing interest on such sum from the date of the breach; such interest not to be considered as any part of the penalty, but as damages for the non-payment or detention of the penalty after it becomes payable and due.

It is commonly said that the damages cannot exceed the penalty of a bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If then the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach.

After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule common to contracts generally applies that where money is due and there is a default in payment interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs.

In some cases courts appear to have been reluctant to allow the interest to commence before the date of the writ upon the penal bond. But why not, logically, from the default as well as from the date of the writ? Interest is allowable from the date of a writ,

only because a defendant is considered in default from that date. Why not to be reckoned from an earlier date, if the default antedates the writ? In some cases of course it would not; in this case it does. It might as well be urged that the costs of an action upon a bond should not be allowed, as that no interest should be, where the costs would carry the execution beyond the penalty named in the bond, for costs are as much of the nature of a penalty as interest is when interest is allowed as damages.

We feel strongly assured that the rule, as declared by us, is maintained by a great majority of the leading American authorities. There appears to be some obscurity and confusion in quite a class of cases, growing out of the want of distinction between what is debt or penalty, and what is merely damages for a detention of the debt or penalty, some courts trusting to the general rule, without stopping to notice differences. Mr. Sedgwick seems to think, that by the English cases the penalty is regarded as being the absolute limit of recovery (2 Sedg. Dam., 6th ed., 262). Still there is some contrariety of view in the English cases, and Sergeant Williams struck the key of the doctrine, in his note to the case of *Gainsforth v. Griffith*, 1 Saund. 51, note 1, saying: "But cases may occur where the obligee, may recover more than the penalty of the bond, as where, by the breach of the condition, the penalty becomes a real debt due from the obligor to the obligee."

It was decided in the early case of *Williams v. Wilson*, 1 Vt. 266, that interest upon a penalty could be added to the amount of the penalty, as damages for detention. In *Perit v. Wallis*, 2 Dall. 252, SHIPPEN, J., expresses the idea in common sense terms, saying: "In short the five thousand pounds (penalty), paid with interest at this day, is not in fact or law more than the five thousand pounds paid without interest, at the day it became due." In *Carter v. Carter*, 4 Day, 30 (2 Am. Dec. 113), it was well stated by counsel *arguendo*, that where the whole penalty is given, it becomes a liquidated sum, and as such, will carry interest; and in same case, it was said *per curiam*, "the penalty becomes forfeited on the first breach; and as it then becomes a debt due unconditionally to the obligee, the court may allow interest from that time, but can never exceed the penalty with interest on it from the first breach."

In *Snedes v. Houghtaling*, 3 Caines, 48 (2 Am. Dec. 250), it was admitted that interest might be recovered against a principal beyond the penalty of a bond. It is difficult to appreciate any dif-

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ference between the liability of a principal and that of a surety on a penal bond. The liability of all the obligors is expressed in precisely the same terms. In *Clark v. Bush*, 3 Cow. 151, SAVAGE, C. J., after reviewing such leading authorities as were in existence at the date of that case, says: "The weight of those authorities is, I think, in favor of the doctrine that in debt on bond nothing more than the penalty can be recovered, at any rate nothing beyond that and interest after a forfeiture, even against the principal obligor." The case of *Brainard v. Jones*, 18 N. Y. 35, a case upon a replevin bond, is like the case at bar, assimilating it in all particulars, and it was there determined that interest could be added to the penalty from the date of the judgment in the original action, that being the date of the breach of the bond; and the opinion in that case, after a clear and convincing argument of the question, concludes in these words: "The question in short is not what is the measure of a surety's liability under a penal bond, but what does the law exact from him for an unjust delay in payment after his liability is ascertained and the debt is actually due from him."

In *United States v. Arnold*, 1 Gall. 348, STORY, J., said: "Notwithstanding some contrariety in the books I think the true principle supported by the better authorities is, that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." In *Bank of United States v. Magill*, 1 Paine, 461, THOMPSON, J., gave interest only from the date of the action, upon the ground that there was no breach in that case till a demand was made, and no demand before the commencement of the suit.

In *Harris v. Clap*, 1 Mass. 307 (2 Am. Dec. 27), is a very earnest and interesting discussion of the question, in which all the judges actively participated. SEWALL, J., said: "This court, especially in a case where a surety may be affected, cannot exceed the express contract of the parties and the legal effect of it. The penalty is recoverable by the express contract of the parties, and the damages estimated at the lawful interest of the penalty are the legal effects of their contract." STRONG, J., said: "What then is the law as to going beyond the penalty? The law as I understand it says, that every man who binds himself in a penalty is liable to pay not only the whole penalty — the debt — but also the legal interest of it as damages for the detention. This rule of law extends to all cases where the condition of the bond is for the payment of money, or where

the value of the condition, if I may so express it, is equally capable of being ascertained as though the sum had been expressed in the condition, which is the present case. When the surety entered into the bond he knew or ought to have known that he was bound to that extent." DANA, C. J., said: "In going beyond the penalty of the bond the court do not go out of the contract, it is no more than the common case of a bond conditioned for the payment of money lying until the sum mentioned in the condition with interest of it exceeds the penalty, in which case the court will give the excess as damages for the detention of the debt; in no case however going so far beyond the penalty as to exceed legal interest on the penalty. At law the penalty is the debt, and for the detention of the debt, damages, real or nominal, are always recoverable." *Pitts v. Tilden*, 2 Mass. 118, as far as the case goes, follows the line marked out in the preceding case in respect to allowing interest upon a penalty after it becomes a debt.

In a *per curiam* opinion in *Warner v. Thurlo*, 15 Mass. 154, the court is erroneously made by the reporter to say that it was decided in the case of *Harris v. Clap*, *supra*, that damages may be recovered beyond the penalty, not exceeding interest on the penalty from the commencement of the suit, while it is plain to be seen that it was decided by a majority of the judges sitting in that case, that interest should run from the breach of the bond, whenever the breach occurs prior to action brought. But the doctrine was not so firmly established at that day as to be positively accepted by courts without some shrinking in applying it to cases, especially in view of contemporaneous English decisions positively affirming an adverse view upon the whole question. As before expressed by us, if interest be allowable at all upon a penalty, we cannot see why it should not commence when the defendant is in default for not paying the penalty. Of course there may be instances where the penalty is not due till demanded, and bringing the action may be the first demand. But in the case now presented for our opinion a breach is evidenced by the judgment in a previous action. The sureties knew then as well as now just what their obligation consisted of. Another inconsistency is seen in some of the earlier cases wherein the doctrine is declared that a greater amount may be awarded against a principal than against sureties upon the same bond, although bound in the same manner and by the same words.

But these illogical distinctions are not kept up in many modern

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cases. The text of Sedgwick on Damages is in this respect corrected by a qualifying note upon page 262, vol. 2, 6th ed., cited *supra*, where may be found a citation of the principal cases upon both sides of the question. In Field on Damages, § 546, note, the rule deduced from a majority of modern cases is stated thus: "Interest on the penalty is now generally allowed on the ground that when there is a breach in the condition of a penal bond, the penalty becomes in law a debt due, and the obligors can discharge themselves from liability on the bond when the damages exceed or equal the penalty, by the payment of the penalty alone; and if it be not paid at the time of the breach, it should bear interest until paid." See cases there cited. See also the case of *Bank of Brighton v. Smith*, 12 Allen, 243.

There is nothing in the point taken by the defendants that the plaintiff should credit the value of the replevied goods upon the bond because he recovered their value of a third person who was indemnified by the principal defendant. The bond is collateral to the whole of the principal's liability. That recovery extinguishes or settles only a part of it. The plaintiff claims to recover the damages and costs awarded him by the judgment in the action of replevin, and an officer's fee on the writ of restitution with interest thereon; and is entitled to recover \$97.62 and interest from March 31, 1877, the date of the judgment therefor, and \$3.40, the officer's fee, and interest on that item from November 14, 1877.

Bond declared forfeited. Judgment for \$110, the amount of penalty, as debt, and interest thereon as damages, enough to make the amount recovered equal to the claims as above reckoned.

APPLETON, C. J., WALTON, DANFORTH, BARROWS and LIBBEY, JJ., concurred.

BURRELL V. STEVENS.

(73 Me. 286.)

Fraud — obtaining goods intending not to pay — promissory note — damages.

The defendant delivered his promissory note in consideration of the payee's promise to deliver him in the future five mowers and four plows. The payee at the time positively intended never to deliver any of the goods. Subsequently he delivered two plows, but never delivered any of the other goods. In an action by an indorsee, with knowledge of the fraud, *held*, that the plaintiff was entitled only to recover for the plows furnished, less the damages sustained by the defendant by the non-delivery of the rest of the articles.*

ACTION on a promissory note. The opinion states the point. The plaintiff had judgment below.

Joseph Baker, for plaintiff.

D. D. Stewart and *A. H. Ware*, for defendant.

PETERS, J. The defendant gave a negotiable note in consideration of a promise of the payees of the note to deliver to him at a future time certain mowing machines and plows. The note is sued by an indorsee, and one of the grounds of the defense was, that the payees obtained the note with an intention never to deliver the implements, and that the indorsee, who sues the note, was conusant of the fraud.

The instructions to the jury upon that point present the question, whether getting property by a purchase upon credit, with an intention of the purchaser never to pay for the same, constitutes such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretenses.

The question has never been fairly before this court before this time, so as to require a deliberate decision. The plaintiff contends that the question was settled in the negative in the case of *Long v. Woodman*. 58 Me. 49. But that case falls short of meeting the question presented in the present case. The gist of the charge against the purchaser in that case seems to have been that he fraud-

* To same effect, *Tulcott v. Henderson* (31 Ohio St. 162), 27 Am. Rep. 501, and note, 504.

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ulently refused to do after the contract what he agreed to do at the time of the contract, the alleged fraud being an intention formed after the contract rather than contemporaneously with it; and that was an action of deceit based upon a broken promise to convey real estate. Of late years, *nisi prius* rulings in our own courts have frequently been in accordance with the law, as delivered to the jury by the presiding judge in the case at bar, and we think the doctrine may safely be accepted and approved, both upon authority and principle.

It is the admitted doctrine of the English cases, and is sustained by most of the courts in the United States. In *Benj. on Sales* (2d Am. ed.), § 440, note *e*, very numerous cases are cited to the proposition. *Stewart v. Emerson*, 52 N. H. 301, discusses the question at length, and reviews many authorities.

The plaintiff relies upon the objection that it is not an indictable fraud, an argument which seems to have inclined the Pennsylvania court against admitting the principle into the jurisprudence of that State. *Smith v. Smith*, 21 Penn. St. 367; *Backentoss v. Speicher*, 31 id. 324. It has been held by some courts to be an indictable cheat, the false pretense being in the vendee's pretendingly making a purchase, while his only purpose is to cheat the vendor out of his goods. It is more often considered however as not a matter for indictment. *Bish. Crim. Law*, § 419. But the objection, taken by the plaintiff, has generally been considered as insufficient to override the rule.

But the doctrine governing the case before us should not be misunderstood. To constitute the fraud there must be a preconceived design never to pay for the goods. A mere intent not to pay for the goods when the debt becomes due is not enough; that falls short of the idea. A design not to pay according to the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud.

Nor is it enough to constitute the fraud, that the buyer is insolvent, and knows himself to be so, at the time of the purchase, and conceals the fact from the seller, and has not reasonable expectations that he can ever pay the debt. Some courts have gone so far as to denominate that a fraud which will avoid the sale. And it may have been so held in bankruptcy courts, in some instances, as between a vendor and the assignee of the vendee. But it would

not generally be enough to prove the fraud. The inquiry is not whether the vendee had reasonable grounds to believe he could pay the debt at some time, and in some way, but whether he intended in point of fact not to pay it.

Nor is it enough, that after the purchase the vendee conceives a design, and forms a purpose not to pay for the goods, and successfully avoids paying for them. The only intent that renders the sale fraudulent is a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods. *Cross v. Peters*, 1 Greenl. 378; *Biggs v. Barry*, 2 Curtis, 259; *Parker v. Byrnes*, 1 Low. 539; *Rowley v. Bigelow*, 12 Pick. 307 (23 Am. Dec. 607). The general principle is found to have been especially applicable in cases where written instruments and negotiable papers have been fraudulently obtained from the makers of them. *Smith v. Braine*, 16 Ad. & Ell. (N. S.) 244; *Hall v. Featherstone*, 3 Hurlst. & Norm. 284.

The defendant received a small portion of the goods which were to be sent to him for the note, and the jury were instructed to render a verdict for the price of those articles, less the damages sustained by the defendant for a non-delivery of the balance of the articles at the contract price. That was correct. The defendant was to be no worse off under his contract because he was defrauded than he would have been if not defrauded. Nor does it make a difference that each article was separately priced in the contract. The contract is an entirety, and the damages are because the articles were not all furnished at the enumerated prices. The plaintiff urges upon our attention that there is no evidence to support any reduction from the price for damages. There is such in the testimony of the defendant.

Motion and exceptions overruled.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

Bangor v. Masonic Lodge.

BANGOR V. MASONIC LODGE.

(73 Me. 428.)

Statute — charity, public — Masonic lodge.

A masonic lodge is not a public charitable or benevolent institution.*

ACTION to recover a tax. The opinion states the case. Case reserved.

T. W. Vose, city solicitor, for plaintiff.

Drummond & Drummond, for defendant.

APPLETON, C. J. The Rising Virtue Lodge, with other lodges, owning a block of stores assessed as of the value of fifteen thousand dollars, claim that this property, a small portion of which in value is used for masonic purposes, should be exempted from bearing its proportionate share of the burdens, which are imposed, for the support of government, on the general property of the community.

The just and honest rule in assessments for governmental purposes is equality of taxation. Whatever sacrifices it requires from the people should be made to bear as nearly as possible with the same pressure upon all. In this way only will there be the least sacrifice by all. If one bears less than his share of the public burdens, some other must bear more. If one block of stores remains untaxed, the remaining stores and other taxable property must be unduly and disproportionately taxed. The more numerous the exemptions, the more unequal and burdensome the taxation.

The defendant corporation denies that its property should be assessed to defray its ratable share of the expenses of the government, which protects it, in common with the other property of the people and corporations of the State. The ground of exemption rests on R. S., ch. 6, § 6, part 2, by which "the real and personal property of all literary institutions, and the real and personal property of all benevolent, charitable and scientific institutions incorporated by this State," are exempted from taxation.

Assuming that the legislature have the power to relieve favored

*See *County of Hennepin v. Brotherhood of Gethsemane* (27 Minn. 460), 38 Am. Rep. 208, and note, 300; *Manners v. Phil. Lib. Co.* (98 Penn. St. 165), 20 Am. Rep. 741.

corporations or individuals from paying their just taxes (and it is as proper in the one case as in the other), still taxation is the general rule ; exemption from taxation the exception. Statutes violating the general rule are to be construed strictly. They must be construed with the utmost strictness. The statute creating the exemption must be clear, precise and definite, so as to satisfy the court beyond all doubt that the exemption claimed was within the intention of the legislature, as every exemption is repugnant to equal and impartial taxation. "All exemptions are to be construed strictly. Such special privileges are in conflict with the universal obligation of all to contribute a just proportion toward the public burdens." *Co. Com. v. Sisters of Charity*, 48 Md. 34. "The power to tax," observes DAVIS, J., in *Bailey v. Magwire*, 22 Wall. 226, "rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment."

Exemption is a special favor conferred. The party claiming it must bring his case unmistakably within the spirit and intent of the act creating the exemption. Charity and charitable uses are expressions recognized and well understood in the law. The object of the legislature was to favor societies existing exclusively for charitable purposes, or as was said elsewhere by an eminent court, for purposes purely charitable, not a society existing for other and distinct purposes, and with other and different objects to be attained. It was the object to protect public charitable institutions.

The statute upon which the defendants rely uses the word "benevolent," but there is no question that this word, when used in connection with charitable, is to be regarded as synonymous with it and as defining and limiting the nature of the charity intended. *Saltonstall v. Sanders*, 11 Allen, 470.

What then is a charity? What is a charitable institution? "A good charitable use is public," remarks GRAY, J., in *Saltonstall v. Sanders*, 11 Allen, 456, "not in the sense that it must be executed openly and in public ; but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual immediately benefited may be private, and the charity may be distributed in private and by a private hand. It is public in its general scope and purpose, and becomes definite and private only after the individual objects have been selected." In *Attorney-General v. Proprietors of Meeting House*, 3 Gray, 50, "A public charity," observes SHAW, C. J., "in legal contemplation, is

derived from gift or bounty." *Attorney-General v. Hewer*, 2 Vern. 387. In the case of the *Attorney-General v. Heelis*, 2 Sim. and Stu. 77, it is said by the vice-chancellor, that it is the source whence the funds are derived, and not the purpose to which they are dedicated, which constitutes the use charitable; if derived from the gift of the crown, or the legislature, or a private gift for improving a town, they are charitable within the equity of the statute of 43 Eliz., c. 4; but when a fund is derived from rates and assessments, being in no respect derived from bounty or charity, it is not charitable. So a subscription by a benefit society, for mutual relief, is a private and not a public charity, and does not require the intervention of the attorney-general. *Anon.*, 3 Atk. 277. The essential features of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality, that gives it its public character. *Donohugh's Appeal*, 86 Penn. St. 306.

Masonry, being a secret institution, and its main purposes being carefully guarded from public scrutiny and knowledge in the secrecy of its lodges, we can only ascertain the objects of its existence from the information afforded us by its constitution and its general regulations, so far as they are made part of the case. The intimate purposes of the institution are not disclosed. They are secret. They are kept sacred. It is only from what is known that we can infer what are its leading objects.

The section relied on as exempting the institution from taxation refers to those which are purely charitable. That masonic lodges are charitable to their own members is not to be questioned, but that is not the question. The inquiry is, whether it is a public charity, or a private charity for the exclusive aid of its members.

The constitution, it seems by the preamble thereto, was ordained and established "in order to form perfect fraternal union, establish order, insure tranquillity, provide for and promote the general welfare of the craft, and secure to the fraternity the blessings of masonic privileges." From the "blessings of masonic privileges," all not members, and all of the female sex not married to masons or begotten by them in lawful wedlock, are excluded, while no woman can be a member, and no man, except by unanimous vote. It will, too, be perceived that charity is not even mentioned as one of the purposes for which the constitution was ordained and estab-

lished, but "the welfare of the craft" and "the blessings of masonic privileges" are specially designated.

It provides for the establishment and preservation of "a uniform mode of working and lectures, in accordance with the ancient landmarks and customs of masonry," and a grand lecturer, "whose duty it shall be to exemplify the work" and "impart instruction to any lodge requiring their services."

Its funds are derived from fees for initiation, assessments, fees for dispensation for holding new lodges, to be paid the grand treasurer, and generally from "fees, dues and assessments."

Of the nine committees for which provision is made in the management of the institution, there is one for charity, whose duty it is to appropriate the interest of the charity, "in whole or in part, for the relief of such poor and distressed brethren, their widows and orphans, as the grand lodge or the trustees of the charity fund may consider worthy of assistance, and if the whole be not so distributed, the residue, with all the other receipts of the treasurer, after deducting therefrom such sums as may be necessary for the ordinary expenses of the Grand Lodge," is to be added to this fund. This limitation of charity in the constitution is found in similar terms in the charter of the defendant lodge.

The jewels and the regalia, the elaborate schedule of official dignitaries with titles implying important functions and grave duties, inconsistent with and unnecessary for the distribution of charities, its splendid processions, its gorgeous rooms, its palatial temples, its "duly" guarded doors, its mysterious rites, its secret signs of recognition, all its rules, regulations and proceedings, so far as made known to the public, negative the idea that charity is the primary and exclusive object of the institution, and conclusively prove that "the welfare of the craft," and "the blessings of masonic privileges," are the objects of its existence. It is a society for mutual benefit and protection, and the ends to be attained are private and personal, not public. The very word "privileges," implies rights and immunities superior to those enjoyed by others.

It is apparent that the defendant corporation cannot be regarded as a purely public charitable institution, because it wants the essential elements of a public charity. It has other objects than charity. Whatever its ultimate purposes, they are other than charitable. Its funds are derived not from devises and gifts, as in case of a public charity, but from fees and the assessment of its

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members. The funds so obtained are to be distributed among the poor and needy members, from whom they were collected, and among their wives and children. It is an association for the mutual benefit of its members, and not a charitable institution within the meaning of the statute. *Bolton v. Bolton*, 73 Me. 299.

In *Babb v. Reed*, 5 Rawle, 157, it was held that a lodge of Odd Fellows, being an association of mutual benevolence among its members, was not a charitable institution. But the Odd Fellows, so far as is known, are a secret institution with signs of recognition and carefully guarded secrets, raising their funds and distributing the same in a similar manner as the Masons. "The association," observes SARGENT, J., in delivering the opinion of the court, "from whose property is the money in court, was formed and conducted without incorporation. Its objects are stated to be the employment of its funds in purposes of mutual benevolence among its members and their families; but these cannot be deemed charitable uses under the common law of Pennsylvania, or the statute of 43 Eliz. The twenty-one cases enumerated in the statute, and others constructively within it, are of a public nature, tending to the benefit or relief in some shape or other, of the community at large, and not restricted to the mutual aid of a few." In *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 524, the case of *Babb v. Reed*, was cited with approbation.

In *Delaware County Institute v. Delaware County*, 94 Penn. St. 163, it was held that an institute of science, whose object was the promotion of general and scientific knowledge among the community at large, but whose benefits were restricted to its members, except at the pleasure of its managers, was not a purely public charity, and was not exempt from taxation as such. "The plaintiff in error," observes the court, "so far from being a purely public charity, is not a public charity at all. It is a private corporation for the benefit of its members, as much as any other beneficial and literary society." It will be observed that other than members were allowed, or might be allowed, to participate in all the benefits of the association, not so with masonic lodges, whose "masonic privileges" and benevolence are limited and restricted to its members and families.

A charitable institution, to be exempted from taxation, must be a purely charitable one. *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 206. The gift or bequest must be for strictly charitable

purposes, else the trust will not be enforced. *Thompson's Ex'rs v. Norris*. The funds of the defendant corporation may be, and are, as the case shows, applied to other than charitable uses," as for the good of the craft," in building a hall for the unknown purposes of its existence. To authorize exemption from taxation its purposes must be "strictly charitable," "purely charitable," not a commingling of other and more important purposes with charity as a mere secondary consideration.

But we are referred to certain decisions as opposed to the conclusions which we have arrived at. It may be proper to remark that the constitution and regulations of the grand lodge were not before nor considered by the court, in the cases relied upon in defense.

In *King v. Parker*, 9 Cush. 71, it was held that a conveyance to certain persons and the survivors of them as joint tenants, but without word of limitation to their heirs or to the heirs of the survivor, in trust to and for the use of an unincorporated lodge of Freemasons, to the only proper use, benefit and behoof of the lodge forever—was in trust and that the estate did not descend to the heirs of the grantor. It suffices to remark that since that decision the question of public charities has been before the same court, and this decision has been not merely doubted, but substantially, so far as relates to the question under discussion, overruled. In *Old South Society v. Crocker*, 119 Mass. 24, WELLS, J., says property held in trust for a monthly meeting of friends seems to have been regarded as a public charity in *Earle v. Wood*, 8 Cush. 430, and in *Dexter v. Gardner*, 7 Allen, 243; and for a lodge of Freemasons in *King v. Parker*, 9 Cush. 71, but neither of these cases was a proceeding which concerned the administration of charity as such. They were suits relating to trusts, in which the rights of private parties alone were represented. There was no public charity declared in either case, and no adjudication which necessarily involved or was based upon the existence of a charitable trust. A fund to be dispensed exclusively by way of mutual aid or benefit, among the members of an association, is a private and not a public charity, 3 Gray, 50; 11 Allen, 64. It may well be questioned, therefore, whether all the conditions requisite for a technical public charity were present in the case of *King v. Parker*, cited above.

The case of *Duke v. Fuller*, 9 N. H. 536, was that of an unin-

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corporated lodge of Masons, one of whose by-laws was that "the furniture and funds of the lodge shall be considered as the joint and equal property of all the members, who shall, by a majority of votes, have management thereof for the good of the craft or for the relief of indigent and distressed worthy Masons, their widows and orphans." The lodge was dissolved and the funds divided among the six attending members and the defendant, who had been its treasurer, and the plaintiff brought his suit for his share. The court held the division void and gave judgment for the defendant. In their opinion they cite Stat. 43 Eliz. relating to "gifts and devises" for charitable uses, as if the funds derived from assessments were derived by "gifts or devises," which they assuredly are not, any more than taxes collected for and appropriated to the support of paupers, are to be deemed within that statute, though that is a more general and extensive charity. Assuming this to be a public charity, the court intimate that in cases of gross mismanagement or dissolution, it might, sitting as a court of equity, take the funds and commit their administration to other hands. But the right to thus interfere can rest only on the ground that this is a purely public charity, which all the authorities show it is not.

In *State v. Addison*, 2 S. C. 499, the decision rests upon the long continued construction by the city council of Charleston, of an ordinance passed in 1793, exempting "all and every * * charitable society from payment of any city taxes now due or to become due." The property of certain real estate belonging to the lodge remained untaxed until the year 1868, when, for the first time, it was taxed. "Having already intimated," observes Moses, C. J., "that we do not consider it as essential for any society claiming exemption under the ordinance of 1793, to show that the charities which it administers are purely for public purposes, we think the relators are to be held within it, because the city council, from the period when the societies first owned real estate in Charleston, to 1868, have given a construction to it which it was too late to disregard or change while it was in force. It is true, as it was not in the nature of a contract, they could have repealed it at their pleasure; but while operative, their action in regard to it for so long a time must be received as the interpretation of their own enactment." It will be perceived that it is not alleged that the lodges in question were within 43 Eliz. The decision rests on the absence

of previous taxation, and on the construction of the language of the ordinance, made by the city council.

In *Mayor of Savannah v. Solomon's Lodge*, 53 Ga. 93, it was held that a masonic institution was a charitable institution and exempt from taxation, but the decision was based solely by WARNER, C. J., upon the statutes of the State. "It was," he remarks, "so recognized and styled by the general assembly of this State, as far back as 1796. See *Marble and Crawford's Digest*, 147." Upon this assumption, and without discussion, the opinion rests. Whether or not it was purely a public charity was neither considered nor discussed.

In *Everett v. Carr*, 59 Me. 326, all that was decided was, that "incorporated masonic lodges might receive in trust, property devised for charitable purposes." They could hold property as trustees, as towns or individuals can, but that does not make the towns, lodges or individuals, public charitable institutions within the statute. They are corporations established for other purposes, and holding specified property for certain purposes. They hold as corporations their own property in their own right, for such purposes as the law permits; and trust property in trust, as other trustees. In the will of Dwinel there were legacies to Everett and others, "in trust, to be used solely and purely for charitable purposes." Neither devise altered the relations of the devisees, so as to make either the lodges or the individual trustees thereby "charitable institutions," and therefore to be exempted from taxation. The only question then was, whether the lodge could take as trustee. That it does charitable acts is not to be questioned, but if charity was not the primary and exclusive object of its existence, and it was not a purely benevolent, charitable institution, the purpose and objects of its existence remaining unchanged, the receiving a devise as trustee would not make it a public, charitable institution, under the statute, when without and before such devise it was not, any more than a bequest to a town for literary purposes would make such town a literary institution. The town can hold a devise for literary purposes, as trustee, precisely as a lodge can for benevolent purposes, without the one being a literary or the other a benevolent institution, within the purview of the statute. *Piper v. Moulton*, 72 Me. 155.

In *Indianapolis v. Grand Master*, 25 Ind. 518, it was held that a lodge was a charitable institution — but its rules and regulations

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were not before the court, nor considered by it. The decision rather assumed it as true that it was a charitable institution, and assuming it to be so, the court decided that it was.

After a careful consideration of the constitution and the general rules and regulations of the Grand Lodge of the State of Maine, and after an examination of the authorities bearing on the question, our conclusion is that a masonic lodge is not a charitable or benevolent institution, within R. S., ch. 6, § 6, par. 2 and that its real and personal estate must bear its equal and just proportion of the burdens of sustaining government with the other property of the community.

Judgment for plaintiff.

WALTON, BARROWS, DANFORTH, PETERS, LIBBEY and SYMONDS, JJ., concurred.

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(73 Me. 472.)

Deed — "appurtenances — mill-dam.

A deed of a "mill and dam, with the appurtenances," will pass not only the dam at the mill, but an easement in a reservoir dam, half a mile above, owned by the grantor of the mill and the lower dam, and for many years used in conjunction with them, and up to which the lower dam has always flowed, although the grantor did not own all the adjoining land between the dams. (*See note, p. 381.*)

WRIT of entry. The opinion states the case.

Joseph Baker, for plaintiff.

Edmund F. Webb, for defendant.

PETERS, J. The demandant, under a complaint for flowage, recovered a judgment for damages against one of the present defendants; sued the same in assumpsit in order to obtain a lien-judgment against the defendants' mill-dam and mill, recovering in that suit; purchased the property in her name at a sale by the

officer upon an execution issued on the latter judgment; and institutes this action to recover possession of the property thus purchased.

[Minor point omitted.]

The description of the demanded premises in all of the writs and papers, including the deed from the officer, is this: "The mill and dam, with the appurtenances, and the land under and adjoining them, and used therewith, situated on and across the stream that constitutes the outlet of the Lovejoy, and formerly owned by Belden Bessey, and now occupied by the respondents." It is argued by the defendants, that this is not a good description, because not giving metes and bounds. We think that in this particular proceeding such a general description is well enough, though such might not be the case in officers' proceedings usually. It is the language of the statute. It may in this case be a safer description to abide by than any other, for both parties.

The defendants contend further, that the description does not embrace the dam which caused the original injury by flowing, and that for that reason the proceedings are erroneous. It appears that there are two dams across the stream, one at the mill, and the other about half a mile above the mill, and within a mile from the pond; that the lower dam flows only up to the upper dam; that the upper dam holds back the principal head of water used at the mill, and caused the flowage which the demandants complained of; that the same person was the owner of the mill and both dams, and that for many years the dams have been used in conjunction with each other; and it may be inferred, we think, from the evidence, that either structure would be of very little value or consequence without the other.

The question, upon these facts, is whether an easement in the upper dam is included in the describing words, "mill and dams, with the appurtenances," as used in the sheriff's conveyance and the other papers. We think it is contained therein, not in express terms, but by the strongest implication. It is an incident to the land granted.

The question is governed by the ancient maxim or rule of law, that when a person grants a thing, he is supposed also tacitly to grant such means of his own as are necessary to thereby attain the thing granted; that when the principal thing is granted, the incident passes with it. *Broom Max.* 362; *Shep. Touch.* 89. Incidents

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attached to land granted pass to the grantee, without any special terms in the conveyance, when necessary for its use and enjoyment. This principle is especially applicable to water privileges in grants of mills dependent for their use and value upon a water-power.

The general principle has various practical applications. A deed of a wharf may by implication include the use of adjoining flats; of a house may convey the right of access thereto; of standing timber grants the necessary facilities for cutting and removing it; of a mine, the opportunities to excavate for it; of a "farm" or "messuage" or "manor," known by any certain name, may include sundry distinct tenements and easements which are necessarily incident to the principal thing described as granted. A "barn," when conveyed or reserved *eo nomine*, may include a shed connected with it, and other privileges. *Cunningham v. Webb*, 69 Me. 92. Under a description of a "rope-walk" in a deed, such land of the grantor may pass as is habitually and necessarily used for its business. *Davis v. Handy*, 37 N. H. 65. An interesting and novel illustration of the principle is seen in the case of *Hougan v. Railroad*, 35 Iowa, 558; s. c., 14 Am. Rep. 504, where it was held that a railroad company, having by grant a right of way for the use and occupation of its railway, had the legal right to dig a well upon such right of way, and to use the water supplied by percolation for railroad purposes, although it materially diminished the supply of water in a spring upon the grantor's land. It has been frequently held that the principle applies to a grant of land with water running to buildings upon it, the grantor having a permanent ownership in the estate and in the waters. *Coolidge v. Hager*, 43 Vt. 9; s. c., 5 Am. Rep. 256.

The maxim of principle is general in its character, and for that reason different courts have been led to different conclusions in many instances, and nice distinctions have arisen in cases. Differences might arise even in respect to some of the cases which we have cited for the purpose of argument and illustration. But in construing conveyances of mills and mill privileges, the course of decision has been uniformly liberal toward the grant. It was laid down by the old writers in general terms, that by the grant of mills, the waters, flood-gates, and the like, that are of necessary use to the mills, do pass." The same doctrine was at an early day accepted in this State. In *Blaks v. Clark*, 6 Me. 436, it was held

that the word "mill" in a conveyance would carry the land under the mill, and might embrace the free use of the head of water existing at the time of the conveyance, as also a right of way and any other easement which has been used with the mill, and which is necessary to its enjoyment. This principle has been acted upon in quite a number of subsequent cases. *Hathorn v. Stinson*, 10 Me. 224; *Maddox v. Goddard*, 15 id. 218; *Rackley v. Sprague*, 17 id. 281; *Crosby v. Bradbury*, 20 id. 61; *Stackpole v. Curtis*, 32 id. 383. SHAW, C. J., defines the principle in *Richardson v. Bigelow*, 15 Gray, 154, as far as applicable to the water-power embraced in such a description. "It is a well-settled rule of law," says he, "that the grant of a mill carries with it, by necessary implication, the right to the use of the water-course coming to the mill, and furnishing power for working it, and also to the canal or raceway which carries the water from the mill, to the full extent of the grantor's right and power so to grant them."

There are cases which hold that the rule would not apply where a mill-site is described by metes and bounds, without any allusion in the deed to any mill or water right or privilege, and there is nothing therein to indicate an intention to include any privileges connected with the main subject of the grant. *Brace v. Yale*, 4 Allen, 393; *Tabor v. Bradley*, 18 N. Y. 109; *Voorhees v. Burchard*, 55 id. 98; *Simmons v. Cloonan*, 81 id. 557.

The objection raised, that land does not pass as appurtenant to land, does not apply in this case. The land is not claimed in the upper dam, but only the use of the land, an easement in it. Nor does the objection, pressed upon our attention, lie, that there was no easement to pass by the grant, for the reason that the grantor had more than an easement, having a full fee. The question is not whether an existing easement passed by the terms of the grant, but whether a new one was not thereby created; whether the proceedings do not carve one out of the defendants' estate; in other words, whether an easement in the dam above is not, in a legal sense, a part and parcel of the privilege below. A mere mill-structure was not the thing granted, but a mill; which implies a water-power; and a privilege in the upper dam is an essential part of that power. The two are but one thing. The two combined are amenable for damages under the flowage act. *Goodwin v. Gibbs*, 70 Me. 243.

The fact that a half mile's distance intervenes between the two dams does not defeat an application of the principle. They are

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connected by a natural stream. All easements are out of land other than the principal land granted. It is the use of the water-course that constitutes the privilege, which may necessarily be for a longer or shorter distance, according to circumstances. It may require a control of the water far above or below the mill. *New Ipswich Factory v. Batchelder*, 3 N. H. 190 (14 Am. Dec. 346). Distance is but one of the elements to be taken into the account. This is outweighed by relatively more important considerations. "It has often been held that a conveyance by metes and bounds of a mill site," says FOLGER, J., in *Voorhees v. Burchard*, *supra*, "carries the right to take and convey and discharge water, from and across lands not within the boundaries given by the deed, for the reason that the power so to do is necessary to the full enjoyment of the property specifically conveyed." The case of *Perrin v. Garfield*, 37 Vt. 312, presents a statement of facts almost identical with those in the case at bar, where the court decided that such an easement passed. PECK, J., in discussing the question, says: "It is said this dam or easement is too far distant to pass by a conveyance of the mill. The proximity of the one to the other is of little comparative importance in determining the question whether an easement passes by a conveyance of the dominant tenement. It depends rather upon the nature, character and purpose of the easement, its relation to the subject-matter of the grant, its accustomed use in connection with it, and its necessity to the value, and to the beneficial and convenient use of the premises granted."

[Minor point omitted.]

Judgment for the plaintiffs.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

NOTE BY THE REPORTER. See *Green v. Collins*, *post*; *Parsons v. Johnson*, 68 N. Y. 68; s. c., 23 Am. Rep. 149; *O'Rourke v. Smith*, 11 R. I. 259; s. c., 23 Am. Rep. 440, and note, 446; note, 38 Am. Rep. 415; *Goodal v. Godfrey*, 53 Vt. 219; s. c., 38 Am. Rep. 671.

In *Manning v. Smith*, 6 Conn. 289, the deed conveyed the land by metes and bounds, *habendum* "with all their appurtenances." Held, not to convey a right to the use of water drawn from the other land of the grantor by an aqueduct for cattle. This seems to have been put on the form of the deed—the *habendum* cannot enlarge the subject-matter of the grant. But the court say that the deed "did not convey any right to the easement unless it belonged naturally and necessarily to the premises." (So in *Spaulding v. Abbott*, 55 N. H. 428, it was held that by the use of the word "appurtenances" in the *habendum* an easement will not pass unless legally appurtenant. And to this effect is *Swazy v. Brooks*, 34 Vt. 451.)

In *New Ipswich Factory Co. v. Batchelder*, 3 N. H. 190 (14 Am. Dec. 346), where a grantor deeded a tract of land described by metes and bounds, with a mill upon the same, and at the

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time of the conveyance there was a race-way to conduct the water from the mill, running along the side of the natural stream, beyond the bounds of the lands granted into other lands of the grantor, and there discharging the water into the natural stream, which raceway had been used with the mill sixteen years and was necessary to the convenient use of the mill; held, that the right to have the water flow off uninterruptedly through the whole extent of the race-way passed as appurtenant to the mill. The court said: "A race-way may be as necessary an appurtenance to a mill to conduct the water from it, as a canal to conduct to it the water necessary to work it."

In *Nitzell v. Paschall*, 3 Rawle. 76, a testator owning four contiguous tracts of land, devised one to his son, describing it as "the saw-mill land, with all the rights and privileges thereunto appertaining." Held, to embrace the right of swelling the water back to the boundary of one of the other tracts, which he devised to another son, as it had long flowed. In *Swartz v. Swartz*, 4 Penn. St. 353, it was held that by a conveyance of a saw-mill with its appurtenances, the right to land covered by the water-power will pass, though not expressly described. So in *Pickering v. Stapler*, 5 S. & R. 107 (9 Am. Dec. 336). But in *Messer v. Rhodes*, 3 Brews. 180, it was held that the grant of land necessary for a mill-site and water-power, with the right to build a dam and dig a race, does not necessarily convey a house and lot of land appurtenant to the mill-site, although measurably necessary to the enjoyment of the privileges granted. The court said: "It is obvious that none of these purposes embraced a right to enter and possess three acres of land for cultivation, or for any other purpose foreign to the privileges granted, or to erect a dwelling-house and inclose a garden for family use."

In *Vermont Central R. Co. v. Hills*, 23 Vt. 681, a grant of a message, to which water was conducted for use by an aqueduct from a spring on another portion of the grantor's land, was held to convey the right to continue to use the water. The court said: "We think it must have the effect to convey the land, with all the privileges of drawing water from other portions of the grantor's land, which were therein used, as appurtenant to the land. It would be wonderful if this were not so in ordinary cases of deeds of lands with artificial ponds and aqueducts. Disapproving *Manning v. Smith*. In *Perrin v. Garfield*, 37 id. 304 the deed of a mill was held to pass, by implication, an easement which the grantor had acquired, by adverse possession, in a dam and flume a mile distant on the land of a third person, necessary to the mill. The court said: "The case shows that the principal supply of water to run the mill was by means of this dam, and that by the privation of it the mill is rendered almost valueless. The general rule of law is, that whenever a party grants a thing he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. This principle is especially applicable to water privileges in grants of mills and factories dependent on a flow of water for motive power. It is said that this dam or easement is too far distant to pass by a conveyance of the mill. But the idea and definition of an easement incident to real estate granted, is a privilege of and beyond the local boundaries of the land conveyed. There is always a dominant and a servient tenement. It is not necessary that they should be contiguous to each other. The proximity of the one to the other is of comparatively little importance in determining the question whether the easement passes by a conveyance of the dominant tenement. It depends rather upon the nature, character and purpose of the easement, its relation to the subject-matter of the grant, its accustomed use in connection with it, and its necessity to the value, and to the beneficial and convenient use of the premises granted. There is a necessary connection between the mill and the stream and fountain of water which supply it, and which had long been used in connection with it." See *Coolidge v. Hager*, 43 Vt. 9; s. c., 5 Am. Rep. 256.

In *Leonard v. White*, 7 Mass. 6 (5 Am. Dec. 19), it was held that by a grant of a grist-mill with the appurtenances thereon, the soil of a way, immemorially used for access to the mill from the highway, does not pass. It was conceded that an easement in the way passed. In *Orittenden v. Field*, 8 Gray, 631, it was held that a conveyance of one of two ancient mills, "and the privilege of the stream," which comprise the entire mill privilege of a stream, carries such a proportion of the whole right in the stream as the water used to drive the mill conveyed bears to that used by the other mill. The court said: "The right of the plaintiff includes the upper or reservoir dam * * * used for more than fifty years as a reservoir for the grist-mill below." The court distinguished this from the case of a

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modern grant of a grist-mill, situated on a stream with several other mills, all drawing from the same level, and where there is only water enough for each mill, in which case they say, "nothing but the mill itself, and the water actually necessary to drive it," would pass. In *Brace v. Gale*, 4 Allen, 303, it was held that a grant of a tract described by metes and bounds, with the right to erect a dam and flow the land above, gives no right to the use of a reservoir dam above, owned by the grantor, although the stream is small and the use of the reservoir dam is necessary to the beneficial use of the mill on the granted premises. Of the argument founded on natural necessity and appurtenances, the court said, "this doctrine is novel, and none of the cases cited give countenance to it."

In *Nederhouser v. State*, 23 Ind. 257, it was held, that a deed of a mill and mill seat, as such, by metes and bounds, will embrace the dam near by, though not included within the bounds given, and not abutting on the land described.

In *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490, there was a grant of land on a stream to A., with a privilege of damming the stream. A. did not dam the stream, but granted the land to B., without expressing any such privilege. Held, that B. acquired no right to dam the stream. The court said that although an easement appurtenant to land will pass by conveyance of the land without express grant of the easement, yet the easement must be actually appurtenant and practically annexed. Citing *Perrin v. Garfield*, *supra*, and *Philbrick v. Ewing*, 97 Mass. 181. To same effect *Swozy v. Brooks*, 34 Vt. 451; *Spaulding v. Abbott*, 55 N. H. 423.

In *Voorhees v. Burchard*, 55 N. Y. 98, one owning certain premises upon which was a saw-mill, conveyed by metes and bounds the portion thereof upon which the mill was located, with appurtenances, describing it as his mill property. Between the premises conveyed and the highway was a piece of land, for many years used as a way to the mill and as a mill-yard for storing logs. There was no other access to the mill from the highway, and the use of the land was necessary to the mill as a mill-yard. Held, that an easement in said land for a way and for a mill-yard was carried with the principal thing conveyed. FOLGER, J., observed: "No right or interest in the locus in quo is, by the terms of the conveyances, carried to Henry W. Rathbone or to Brady. But some things pass by a conveyance of lands, as incidents appendant and appurtenant thereto, though not named therein. This is the case with a right of way, or other easement appurtenant to land. So that in the case of a devise of a mill and appurtenances, that is carried which was actually used by the testator in his life-time as appurtenant, or by his devisee soon after his death, or in the absence of evidence of either, that which shall be found by a jury to be necessary. *Blaine's Lessee v. Chambers*, 1 S. & R. 169. And in the case of a conveyance of land, described as 'the same on which a mill stands,' everything passes necessary for the full and free enjoyment of the mill. *Comstock v. Johnson*, 46 N. Y. 615. And though the description in the instrument may not cover the thing claimed as appurtenant, the same will pass if it is apparent from the conveyances, and the circumstances connected with the manner of the use and enjoyment of the land, that it is included in it. *Huttemeier v. Albro*, 18 N. Y. 43. It is to be observed in the first of these cases, which is a leading one, stress is laid upon the fact that the devise was of the mill, with the appurtenances; and the necessary water, with a race to conduct it, it is said was appurtenant. It is also suggested that there must have been a small parcel of land adjoining; how much, and how situated, being a fact to be inquired of by the jury—in which inquiry they were first to seek what was actually used by the testator; failing in this, what was occupied by his devisee soon after his death; and finding no trace of this, then to decide by their own judgment what was necessary, and to presume that it was intended by the testator. But the controlling thing is this, how much and what was necessary for the mill; the actual use by the successive owners being evidence of this. And so also in the case secondly cited, it is the necessity of the mill for its full and free enjoyment, which controls in indicating what and how much shall pass as an incident, appurtenant to that in terms conveyed."

In *Comstock v. Johnson*, 46 N. Y. 615, there was a grant of land on which stood certain mills with the privilege of drawing from the grantor's dam sufficient water "for the use of said works," together with the appurtenances, etc. The description was in terms substantially as above. For more than forty years, an open space in front of the mills,

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belonging to the grantor, had been used for piling and sawing wood for the use of the mill. On this space the grantee placed a buzz saw driven by water from the grantor's dam. The court said: "The only serious question in the case relates to the use of the buzz saw in front of the mill. The plaintiff did not by his deed acquire the title to the land in front of the mill, because the description is limited to the land upon which the mill stands; but he did acquire an easement in such land for the purpose of ingress and egress, and also for the purpose of piling and sawing wood for the use of the mill, as it had been used and enjoyed for forty years. Every thing necessary for the full and free enjoyment of the mill passed as an incident, appurtenance to the land conveyed. 2 Kent Com. 457; *Blaine's Lessee v. Chambers*, 1 S. & R. 174. But this would not authorize the plaintiff to erect and use machinery upon this land not necessary to the use of the mill, as it had been used, and would not authorize the use of the buzz saw upon that land. The objection is not that the plaintiff propelled the buzz saw with the water from the dam, as he had the right to use the water for any machinery and in any place which he was entitled to occupy; but he could not occupy the space in front of the mill for that purpose.

In *Adams v. Conover*, New York Court of Appeals, Jan. 1882, a warranty deed transferred by metes and bounds a dam and water power, as it stood, at its apparent and existing height. The dam at that height overflowed the land of a third party, who recovered damages therefor against the grantee. The grantee was compelled to reduce the height of the dam. *Held*, that the grantee could maintain an action against his grantor for breach of warranty. The court distinguish *Green v. Collins*, post.

In *Simmons v. Cloonan*, 81 N. Y. 557, it was held, that a deed of land with a mill on it, "with the appurtenances," carries the right to draw water through an existing flume from a reservoir on other land of the grantor, and this is so although the grantor at the time was not in actual use of the reservoir and flume, and the mill was fitted with steam power as well. The court said: "Founding their argument upon the language of the opinions in *Nicholas v. Chamberlain*, Cro. Jac. 121, cited by this court in its former decision, it is urged that something more than the mere unity of the legal title with the then present existence of its visible incidents is necessary to cause the appurtenances to pass by the deed, or to make them lawfully, and properly such; that in this case there must have been, at the date of Hasbrouck's deed to Smith, not only ownership in the grantor both of reservoir and lot, but also occupation, and use of them by him in connection with the water-power alleged to have been conveyed, and that no such occupation or use of the new mill lot with its incidents by Hasbrouck was proven. We do not think the case cited goes quite so far as claimed. The doctrine relied on was not essential to its decision, and certainly has not been recognized in our own reports. Closely examined we think the case holds no more than this, that there must be knowledge by the owner of the existing incidents. 'Not taking cognizance of any such erection, nor using it,' is the language of POPEHAM, chief justice. Using the water-power would show knowledge of its existence as an incident of the property in the hands of the grantor. The same idea is indicated by our own rule that the incidents which pass as appurtenant must be 'open and visible,' from which fact the knowledge of their existence by the grantor is a natural inference. But such knowledge may be shown otherwise than by the grantor's actual use, and in this case most certainly existed. * * * 47 N. Y. 2. We do not however, decide that actual use by the grantor of the incidents or appurtenances is essential to their passing by his deed. We prefer to adhere to our own authorities which have imposed no such condition. It is further argued that under our own decisions, the appurtenances which pass must be such, and such only, as are 'absolutely necessary to the enjoyment of the property conveyed,' and that the mill in question having been fitted with steam-power for use when the water-supply was insufficient, it cannot be said that the use of the reservoir was absolutely necessary. The argument does not convince us. The full enjoyment of the property could not be had if the water-power was removed. One important force for driving its machinery would be cut off; and the water-power was therefore necessary to the enjoyment of the property. Indeed it was so much so that the proof shows its value to be almost wholly dependent upon the right to use the water."

In *Farmer v. Ukiah Water Co.*, 56 Cal. 11, L., owning a house and four acres of land, purchased of defendant the right to draw water from its pipes, aqueducts and reservoirs, and constructed a pipe accordingly, and a tank, cistern and bath-room in the house,

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which he fed through the pipe. He afterward conveyed the premises and appurtenances to B., and still later he conveyed the water-right to T., who conveyed it to the defendant. *Held*, that B. took the water-right as appurtenant. The court said: "Water-courses have long been designated by the courts and text-writers as natural and artificial, and when neither is specifically mentioned, it might very reasonably be held that either was meant. That the water in controversy was 'by right used with the land for its benefit' is conceded. But it is contended by the respondent that this water-right is neither an easement nor a covenant real, and that therefore it did not pass with the premises as appurtenant thereto. 'The right of having water flow without diminution or disturbance of any kind' is called an easement by section 801 of the Civil Code. Lamar had acquired the right to have a certain volume of water flow upon his premises, and no one had a right to diminish or disturb the flow of it. He had a right to alienate it, and if it was appurtenant to the land which he conveyed, he did alienate it. Appurtenances may be of a corporeal or incorporeal nature. *Jackson v. Striker*, 1 Johns. Cas. 284. In the case of *Nicholas v. Chamberlain*, Cro. James, 121, Croke says: 'It was held by all the court, upon demurrer, that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and the pipes pass with the house, because they are necessary and appurtenant thereto.' An appurtenance is that which belongs to another thing, but which has not belonged to it immemorially. 1 Vent. 407; Co. on Litt. 121 b, and 122 a; Moore, 682. 'Appurtenant denotes annexed or belonging to; but in law it denotes an annexation which is of convenience merely, and not of necessity, and which may have had its origin at any time, in both of which respects it is distinguished from appendant.' Abb. Law Dict., title 'Appurtenance.' It is contended on behalf of respondent that this water-right did not pass by Lamar's deed as appurtenant to the land conveyed, because Lamar's grantor did not convey to him any land to which this right was appurtenant. But Lamar did convey land to which it was appurtenant, and as an appurtenance may be annexed to land at any time, the question whether it was annexed at the time of his purchase or afterward must be quite immaterial. It is the nature and use of the thing annexed which makes it appurtenant or not, as the case may be."

In *Cave v. Crafts*, 55 Cal. 135, the right to the use of an existing *zanja*, or canal, running from other lands of the grantor, for irrigation, was held to pass as appurtenant. The court observed: "Doubtless while the title of the whole rancho remained in the Lugos, they might have diverted the waters of the *zanja* anywhere within the boundaries of the rancho. But the Lugos, having continued the exclusive appropriation of the lands at Cottonwood Row until the sale and conveyance of such lands, the question arises: Did not the exclusive use of the waters attach as appurtenant to the lands at Cottonwood Row, in such sense, that neither the Lugos nor their grantees of lands on the *zanja* above could divert the waters or deprive the owners of Cottonwood Row of their accustomed use? In *Lampman v. Mills*, 21 N. Y. 505, DEMO, J., said: 'The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burden that appear at the time of sale to belong to it, as between it and the property which the vendor retains. * * * No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burden existing at the time of sale.' It has been said that the rule as adopted in *Nicholas v. Chamberlain*, is recognised fully by the courts of this country. Wood Nuts., § 415. In that case (Cro. Jac. 121) it was laid down: 'If one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, the conduit and pipes pass with the house, because they are necessary, *et quasi* appendant thereto.' When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers

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it. 'If the grantor has already treated this portion as a separate property, the mode in which he enjoyed it, or suffered it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it.' *Phear on Waters*, 73. There can be little doubt that throughout the entire possession of the Lugos the waters were conducted through the *zanja* to Cottonwood Row, and for purposes of irrigation. The use of these waters to the extent, at least, to which they had been previously employed, may have been, and it is fair to presume was, the chief, perhaps only inducement to the purchase by plaintiffs and their grantors. To authorize judicially the diversion and material reduction of the waters would be a violation of the principle that they took with all the apparent benefits and easements belonging to their purchase. And in cases like the present, the purchaser is entitled to the benefit of the easement without any *express* reservation or grant. *Pyer v. Carter*, 1 H. & N. 916. The word 'appurtenances' is not necessary to the conveyance of the easement. The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. The idea and definition of an easement to real estate granted is, a privilege off and beyond the local boundaries of the lands or tenement conveyed—in the present case, the privilege of conducting the water through the lands retained by the Lugos, the common grantors of the plaintiffs and defendants, by means of the *zanja*. *Ang. Water Courses*, 153a; 97 *Mass.* 133; 4 *Gray*, 379. The parties at Cottonwood Row having acquired their lands with the use of water, by means of the *zanja* attached, and *quasi* appurtenant to them, no subsequent act of their grantor could divest them of their right."

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(73 Me. 487.)

Deed — delivery of, signed by grantee, in grantor's name.

One is bound by his acknowledgment and delivery of a deed to which his name has been signed by the grantee.

W RIT of entry. The opinion states the point. Case reserved.

A. P. Gould, for plaintiffs.

C. E. Littlefield, for defendant.

WALTON, J. The only question is whether a deed can be made valid by subsequent acknowledgment and delivery, when the name of the grantor has been signed to it by the grantee. We think it can.

If one acknowledges and delivers a deed which has his name and a seal affixed to it, the deed is valid. No matter by whom the name and seal were affixed. No matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption, so distinct and emphatic, that they will preclude the grantor from afterward denying that the signing and

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sealing were also his acts. They are his by adoption. Without delivery the instrument has no validity. By force of our statutes the instrument is incomplete without acknowledgment. Till one or both of these acts are performed the instrument has no more validity than a blank deed. By taking the instrument in this incomplete condition and completing it, the grantor makes it his deed in all its particulars. He adopts the signature and the seal the same as he does the habendum and the covenants, which were inserted by the printer of the blank. The deed is not sustained on the ground of ratification, but adoption. Ratification applies to agency. No question of agency arises in this class of cases. The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case the authority or the ratification would have to be by instrument under seal; for authority or ratification must be of as high a character as the act to be performed or ratified. If the act is the execution of a sealed instrument, it must be authorized or ratified by a sealed instrument. We therefore repeat that the validity of the instrument in this class of cases does not rest on agency or ratification, but on adoption. No matter by whom the signing and sealing were performed, nor whether with or without the grantor's consent. By completing the instrument, he adopts what had previously been done to it, and makes it his in all its particulars.

It is not often important to notice this distinction, but it is important in this case in order to avoid the apparent absurdity of holding that an agent can contract with himself, can be both grantor and grantee. An agent cannot contract with himself. He cannot as agent for the grantor execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument. But its validity rests upon the ground of adoption, not agency or ratification. And when the word "ratified" or "ratification" is used in this class of cases, as it often is, it will be found on careful examination that it is used in the sense of "adopted," or "adoption," and not in the technical sense in which it is used in the law of agency. *Bartlett v. Drake*, 100 Mass. 174; Story on Agency, §§ 49 and 252; *Lovejoy v. Richardson*, 68 Me. 386, and cases there cited.

Action to stand for trial.

APPLETON, C. J., BARROWS, DANFORTH and VIRGIN, JJ., concurred.

EXCHANGE BANK V. McLOON.

(73 Me. 496.)

Assignment — of part of chose in action.

An assignment of part of a chose in action is valid in equity.

ACTION for money paid and expended. The opinion states the point.

A. P. Gould, for plaintiff.

Orville D. Baker and Joseph Baker, for claimants.

PETERS, J. It appears from the facts in this case, that William McLoon and his son, Charles William McLoon, were the owners of a ship destroyed by the Confederate cruiser *Alabama*, the former owning an eighth and the latter seven-eighths thereof; that soon after the loss of the ship the son died intestate, the father being his sole heir; that soon after the son's decease the father died intestate; that his administrators, who were also administrators upon the estate of the son, petitioned the court of commissioners upon the *Alabama* claims, to recover the value of the vessel, her freight and fittings, setting forth all the claims for the father and son in a single petition, and recovering accordingly; that during the pendency of the petition, Silas W. McLoon, another son of William, and as such entitled to one-seventh of his estate, assigned his share of the funds, to be received by his father's administrators for the loss of the ship, to certain of his creditors; that after the administrators received the funds, other creditors of Silas sued him and trustee the administrators; that it turns out that the administrators are indebted to Silas, not for his share of those funds alone, and separate from the other funds of the estate, but for a seventh of the entire funds of the estate in their possession, which exceed the amount recovered for such loss; and that there is a conflict of claim for the assigned fund between the attaching creditors and assignees.

The questions are these: *First*, Is the assignment of a part only of an entire demand or chose in action, valid in equity, so as to be

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upheld in a court of equity, against the consent of the person owing the demand assigned? *Second*, If so, is the fund in a situation, under the proceedings now before us, to authorize us to decide upon its equitable distribution? *Third*, To what extent is the fund to be subjected to an equitable distribution, if at all, upon the facts adduced?

The first is an important question not before decided in this State. It is universally admitted at the present day, that the whole of a chose in action may be assigned, and the assignment be binding upon the debtor. This is but an equitable assignment, unknown to the ancient common law, but such as the later common law takes notice of and protects, allowing the assignee to use the legal remedies in the name of the assignor. But courts of law, not as such exercising equitable jurisdiction, do not protect or recognize an assignment of a part only of an entire demand. At law, a partial assignment may be good between the parties, and if the assignor collects the money, he would in such case hold it as the trustee of the assignee. But the assignee has no legal remedy against the debtor who does not become a party to the arrangement. The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and sub-divided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear. In support of this doctrine, as one of law, the following cases have been commonly cited and relied upon: *Mandeville v. Welch*, 5 Wheat. 377; *Tiernan v. Jackson*, 5 Pet. 580; *Gibson v. Cooke*, 20 Pick. 15; *Robbins v. Bacon*, 3 Me. 346.

In a court of equity however the objections to a partial assignment of a demand which are formidable in a court of law disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court and run no risk as to its proper distribution. If he be in no fault no costs need be imposed upon him, or they may be awarded in his

favor. If he be put to extra trouble in keeping separate accounts he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law, with its present modes cannot, protect the rights and interests of all parties concerned.

The debtor is not the only party whose interests should be considered. There is as much natural equity in many cases in protecting an assignment of a part of a claim as an assignment of the whole of it. Equitable assignments are the outgrowth of the requirements and refinements of the present business era. In many ways, directly and indirectly, do circumstances create assignments of parts of funds, in dealings through servants, tenants, consignees, bankers and other agencies. Disastrous results will often be experienced by deserving and innocent persons, if this boon be not granted by courts of equity. The case at bar illustrates it. The parties in this case supposed the assignment covered all the funds the assignor had, while it turns out that the administrators had a slightly larger amount to be distributed. This is a race too between creditors. The statute allows the funds to be intercepted by creditors in different suits, and the administrators might be required to make as many payments as there are suits. Should it be that a debtor cannot assign to a creditor what the same creditor may attach? We must bear in mind that both the common law and equity have been constantly progressive in the consideration of commercial questions. And the spirit of progress has also actuated legislatures in the same direction. Most of the States of the Union have passed laws allowing an assignee of a chose in action to prosecute the claim in his own name; and the privilege is now most liberally accorded to an assignee by an English enactment, notwithstanding Lord COKE's belief that "any right of assignment would be of great oppression of the people, and the subversion of the due and equal execution of justice." See act of 1873 (36 and 37 Vict.), ch. 66, § 25, sub-§. 6. We think upon reason and principle, partial assignments should be sustained in a Court of Chancery in all cases where it can be done without detriment to the debtor or stakeholder, whenever equitable and just results may be accomplished by it.

The doctrine is vindicated directly and indirectly by a great deal of authority. It was recognized at an early day in the English chancery cases. *Row v. Dawson*, 1 Ves. Sen. 331; *Yeates v. Groves*, 1 Ves. Jr. 280; *Ex parte South*, 3 Swanst. 392; *Fitzgerald*

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v. *Stewart*, 2 Sim. 333 ; s. c., 2 Russ. and Myl. 457; *Lett v. Morris*, 4 Sim. 607; *Watson v. Duke of Wellington*, 1 Russ. and Myl. 602.

In *Burn v. Carvalho*, 4 Myl. & C. 690, Lord COTTENHAM lays down this statement of the principle: "In equity an order given by a debtor to his creditor upon a third person having the funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the funds." And previous cases are reviewed in the opinion in that case in the following manner: "In *Row v. Dawson*, Lord HARDWICKE says, 'It is a credit on the fund and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a chose in action, this court does, and any words will do, no particular words being necessary thereto;' and in *Yeates v. Groves*, Lord THURLOW says: 'This is nothing but a direction by a man to pay part of his money to another for a valuable consideration. If he could transfer he has done it; and it being his own money he could transfer.' In *Ex parte South*, Lord ELDON says: 'It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him. On the other hand this doctrine has been brought into doubt by some decisions in the courts of law which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions, but is certainly not the doctrine of this court.' In *Fitzgerald v. Stewart*, and *Lett v. Morris*, the same rule was acted upon; and in *Watson v. Duke of Wellington*, Sir J. LEACH thus defines an equitable assignment: 'in order to constitute an equitable assignment there must be an engagement to pay out of a particular fund.'

* * * Here there is an existing fund in an agent's hand, and there is a distinct contract to discharge the liability out of that fund."

Lord TRURO, in *Rodick v. Gandell*, 1 De G., M. & G. 763 ; s. c., 12 Beav. 325, reviewed the cases extensively, and expresses a similar opinion as to the principle to be deduced from them. The same rule has been repeatedly acted upon in the later English chancery decisions. *Addison v. Cox*, L. R., 8 Ch. 76, reviews and approves the doctrine of the earlier cases. That was a case where an officer assigned a part of a sum due to him from the sale of his commission, and the sale was held to be valid. *Brice v. Bannister*, 8 Q. B. Div. 569, is a pertinent case. The facts were these : A.

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agreed to build a vessel for B., the price of which was to be paid by installments. Before the vessel was finished, the builder, being in debt to C., by an instrument in writing directed B. to pay C. £100 out of moneys due or to become due from B. to the builder. B. had notice but refused to be bound by it. The written transfer was held to be an equitable assignment of that part of the money then due to the assignor, and it was decided that the assignee could sustain an action therefor against B. under a provision of the act creating the Supreme Court of Judicature, which allows an assignee to have in his own name either legal or equitable remedies. Other cases are decided upon the same principle. *Ranken v. Alfaro*, L. R., 5 Ch. D. 786; *Ex parte Hall*, L. R., 10 Ch. D. 615; *Hopkinson v. Forster*, L. R., 19 Eq. 74; *Thomson v. Simpson*, L. R., 5 Ch. 659; *Brown v. Bateman*, L. R., 2 C. P. 272; *Field v. Megaw*, L. R., 4 C. P. 660.

In some cases in Massachusetts the doctrine appears not to have been yielded to, but the discussions have arisen in cases at law and not in equity. *Palmer v. Merrill*, 6 Cush. 282; *Tripp v. Brownell*, 12 id. 376; *Bullard v. Randall*, 1 Gray, 605; *Dana v. Third Nat. Bank*, 13 Allen, 445.

In New York the doctrine is well-established by a series of cases covering a long period of time. *Morton v. Naylor*, 1 Hill, 583 and cases cited in note. *Bradley v. Root*, 5 Pai. 632; *Phillips v. Stagg*, 2 Edw. 108; *Marshall v. Meech*, 51 N. Y. 140; s. c., 10 Am. Rep. 572; *Alger v. Scott*, 54 N. Y. 14; *Brown v. Mayor of New York*, 18 N. Y. Sup. Ct. 22; *Jones v. Mayor*, 47 N. Y. Super. Ct. 242. In *Field v. Mayor of New York*, 2 Seld. 179, the precise question was presented and fully discussed and decided in accordance with preceding cases in that State. In *Risley v. Phoenix Bank*, 83 N. Y. 318; s. c., 38 Am. Rep. 421, the rule was again applied and the doctrine affirmed, where the question was disposed of in these words: "The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well-settled rule in this State. This point was ruled the same way by the court of King's Bench in *Tibbetts v. George*, 5 Ad. & Ell. 107. The tendency of modern decisions is in the direction of more fully protecting the equitable right of assignees of choses in action, and the objection that to allow an assignment of a part of an entire demand might subject the creditor to several actions to enforce a single obligation, has much less force under a system which requires all

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parties in interest to be joined as parties to the action." See s. c., 18 Supreme Ct. 484.

The same result is reached by the Pennsylvania court. In their latest case touching the question, *Appeals of City of Philadelphia*, 86 Penn. St. 179, it was held that the principle, for reasons of public policy, should not apply to claims against a municipality, the court remarking that "There is no doubt that as between individuals the rule prevails in equity." In *Daniels v. Meinhard*, 53 Ga. 359, it was held that the holder of a fire insurance policy after a loss might assign in writing an interest in the same to a creditor to the extent of the creditor's debt, which would prevent an attachment of it as the property of the assignor by trustee process. In *Stanberry v. Smyth*, 13 Ohio St. 495, the court refused to recognize the principle in an action at law; expressly admitting that it would obtain in equity, "where the rights of all the parties could be determined in one and the same controversy." In *Etheridge v. Vernoy*, 74 N. C. 800, which was "a civil action in the nature of a bill in equity," the rule was applied. Similar decisions have been made in other courts. *Dowell v. Cardwell*, 4 Saw. 217; *Lapping v. Duffy*, 47 Ind. 51; *Whitney v. Cowan*, 55 Miss. 626. The above are marked cases illustrating the rule. New Hampshire cases cast some light upon the question. *Conway v. Cutting*, 51 N. H. 407; *Christie v. Sawyer*, 44 id. 298. The doctrine is adopted in New Jersey, acted upon in Vermont, and evidently approved by the Supreme Court of the United States, as a rule in chancery. *Public Schools v. Heath*, 15 N. J. Eq. 22; *Clafflin v. Kimball*, 52 Vt. 7; *Christmas v. Russell*, 14 Wall. 69; *Trist v. Child*, 21 id. 441.

There is a concurrence of opinion also among text-writers so far as the question is noticed by them. 2 Story Eq. Jur., § 1044; 2 Spence's Eq. Jur. *859; Byles on Bills (6th Am. ed.), 171; 1 Pars. on Notes and Bills, 334. The American editors of *Leading Cases in Equity* (1st ed., vol. 1, pt. 2, p. 234), say: "But whatever may be the intrinsic propriety or convenience of the doctrine, it seems too well established by authority to be shaken, that the partial assignment of a debt is binding in equity and will invalidate subsequent payments to the assignor to the extent thus assigned." In subsequent editions however the doctrine is not so conclusively stated. The Roman law contained the same principle. It allowed a single debt to be assigned in parts, but required all the assignees

to join in one suit and receive the whole debt at one time. WARE, J., in the case of *Hull of a New Ship*, 2 Ware, 203.

The counsel for the attaching creditors relies upon the cases of *Mandeville v. Welch* and *Tierman v. Jackson*, *supra*, as asserting that there can be no equitable assignment of a part of a demand which a court of equity will protect. We understand the opinions in those cases to declare no more than that a court of law cannot protect such equitable assignments. Those were actions at law. In the former STORY, J., says: "The second question is whether, under all the circumstances of the case, Prier was an assignee in equity entitled to maintain the present action." In the latter case the same judge said the question was whether the assignee could maintain that action, adding these words, "whatever might be the case in a suit in equity brought to enforce his equitable claims under his assignment." We think the counsel falls into the same error in attributing the same meaning to the words of the opinion in *Getchell v. Maney*, 69 Me. 442. The most that was intended to be said there was, that without the assent of the debtor, a creditor cannot assign part of a debt or chose in action so as to give an equitable interest or lien which a court of law can recognize and protect. The learned judge who delivered the opinion of the court in that case did not undertake to say, nor had he any occasion to say, what would be the rule in such a case in a court of equity. As before seen, a court of law protects the assignment of an entire demand, although that is an equitable and not a legal assignment. Further than that the law does not deal with equitable assignments. It matters not whether the partial assignment be by parol or by a formal instrument or by an order or draft upon a particular fund. Neither law nor equity observes any difference in the kinds or modes of assignment. Neither is a legal, while either may be an equitable assignment. Where a draft or order constitutes an assignment it must be upon a particular fund. It is not enough that it is drawn upon a debtor by a creditor in general terms.

[Omitting the other questions.]

Judgment affirmed.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

Griffith v. Douglass.

GRIFFITH V. DOUGLASS.

(73 Me. 532.)

Mortgage — of chattels to be acquired — attaching creditors.

Where one mortgaged personal property to be afterward acquired, and having acquired it delivered it to the mortgagee under the mortgage, *held*, inoperative as against attaching creditors of the mortgagor.

TRESPASS against an officer. The opinion states the facts.

David Hammons and Enoch Foster, Jr., for plaintiff.

K. A. Frye, and Black and Holt, for defendant.

APPLETON, C. J. This is an action of trespass against the sheriff for the taking and carrying away by his deputy of certain goods and chattels to which the plaintiff claims title. The defendant justifies their seizure under writs in favor of Orange C. Littlefield and others against Joseph F. Barden, whose property he alleges them to be.

Joseph F. Barden and wife then residing in Lewiston, but intending soon to remove to Bethel, and being indebted to the plaintiff, on the twentieth of May, 1873, executed a mortgage to secure such indebtedness of "the following described property, viz. : all the furniture and furnishings now owned by us or to be owned by us to be used and kept at the Chandler House, so called, at Bethel, in the county of Oxford, intending hereby to convey all furniture and furnishings of every description, consisting of beds, bedding, tables, chairs, carpets, stoves, etc., etc., now owned or to be owned by us, * * * provided also that it shall and may be lawful for said Joseph and Georgiana Barden (the wife) to continue in the possession of said property without denial or interruption by said Griffith until condition broken."

The mortgage was recorded in Bethel, where the parties then resided, on the twenty-seventh of September, 1878, and in Lewiston on the twenty-eighth of September, 1878. The attachments, which constitute the trespass complained of, were made on the thirtieth of the same September.

The suit is for goods purchased by the mortgagors after the date of the mortgage. The plaintiff is an aunt of Mrs. Barden, whose husband kept the Chandler House, and boarded there. As articles were purchased for the house Mr. Barden would deliver the same to the plaintiff under the mortgage as security. The delivery being thus made, he remained in the use and control of the same. The question presented for determination is whether the plaintiff has a good title as to the goods purchased subsequently to the mortgage as against attaching creditors.

By Rev. Stat., ch. 91, § 1, "no mortgage of personal property, to secure payment of more than thirty dollars, shall be valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the town or plantation, organized for any purpose, in which the mortgagor resides."

The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. Hence it is obvious that the property mortgaged, whether real or personal, the person mortgaging, to whom the mortgage is made, and the debt or claim to be secured, should be fully disclosed and made apparent of record. It would necessarily follow that the mortgage could only embrace what was *in esse*, what could then be taken possession of and the possession retained — what then could be described as existing, and what in case of litigation could be identified as the same as that described, and that what was not *in esse* and not owned by the mortgagor could not be mortgaged, because there was nothing the mortgagor could deliver or the mortgagee receive and to which the mortgage could attach. If the mortgage is held to cover what was mortgaged, and what was not mortgaged because not *in esse* and not then owned by the mortgagor, then the notice to the public, which was the primary object of the statute, conveys no trustworthy or reliable information. The mortgage may cover whatever is capable of being mortgaged, not at its date, but whatever the mortgagor might at any subsequent time acquire.

The rights of parties are to be determined by the statute. To be protected the mortgagee must take delivery and retain possession

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of the mortgaged property or have the mortgage recorded, otherwise his claim will not be "valid against any other person than the parties thereto." It is not enough that there be delivery but there must be retention of the property mortgaged. But there can neither be delivery nor retention of such property unless the mortgagor has the same to deliver. Delivery by the mortgagor and retention by the mortgagee of the property mortgaged are the statutory equivalents of recordation. Whatever delivery and retention of possession will enable the mortgagee to hold will be equally held by the recorded mortgage. But what cannot be delivered and retained cannot be recorded as what is to be mortgaged. The rights of the parties are statutory. The statute thus making the one the equivalent of the other, the record is valid only to protect goods which at the giving of the mortgage could be delivered and retained. Consequently the mortgage cannot be held to secure after purchased goods, whatever may be its language.

Such is the uniform and unvarying decision of courts of common law. In *Head v. Goodwin*, 37 Me. 181, it was decided that a grant of goods which did not then belong to the grantor was void. In *Chapin v. Cram*, 40 Me. 561, the mortgage provides "that all drugs, medicines, wares, merchandise and fixtures of every description, which may be hereafter purchased to replace any of those then in the store shall be held for the payment of the sum; hereafter named, in the same manner as those now in the store, as also all additions to said stock." "It is quite clear," observes TENNEY, J., in delivering the opinion of the court, "that the additions to said stock obtained by the mortgagor, after the execution of the mortgage to the defendant, without any further act would confer no rights therein. *Lunn v. Thornton*, 1 Man., Gran. and Scott, 383; *Jones v. Richardson*, 10 Metc. 481; *Head v. Goodwin*, 37 Me. 181. To purchase such additions to the stock, the mortgage constituted no agency in the mortgagor." That that is the rule at common law is conceded in *Morrill v. Noyes*, 56 Me. 458, and in *Emerson v. E. & N. A. Railway*, 67 id. 391; s. c., 24 Am. Rep. 39; while as between the parties to the mortgage, the right of the mortgagee to after-purchased goods would be upheld. *Allen v. Goodnow*, 71 Me. 420.

The general current of authority is in accord with views above expressed. It was held in *Jones v. Richardson*, 10 Metc. 481, that a grant of goods which are not in existence or which do not be-

long to the grantor at the time of executing the deed, is void, unless the grantor ratify the act by some new act done by him with that view, after he has acquired property therein. In *Barnard v. Eaton*, 2 Cush. 295, by the terms of the mortgage, the mortgagor was allowed to sell the goods mortgaged, others of equal value being substituted therefor, it was held that the mortgage could not apply to goods intended to replace those which were sold. "A mortgage," remarks SHAW, C. J., "is an executed contract; a present transfer of title, although conditional and defeasible, it can only therefore bind and affect property existing and capable of being identified at the time it is made, and whatever may be the agreement of parties, it cannot affect property afterward to be acquired by the mortgagor." In *Codman v. Freeman*, 3 Cush. 306, it was decided that a stipulation, in a mortgage of personal property, that after-acquired property should be subject to such mortgage, does not bind property subsequently purchased. These views were re-affirmed in *Chesley v. Josselyn*, 7 Gray, 489; and *Moody v. Wright*, 13 Metc. 17; and in *Chase v. Denny*, 130 Mass. 566. In *Williams v. Briggs*, 11 R. I. 476; s. c., 23 Am. Rep. 518, it was held in an elaborate opinion by DUFFEE, C. J., that at common law a mortgage of subsequently acquired property would transfer no title to the same. In *Ranlett v. Blodgett*, 17 N. H. 305, referring to the subject under consideration, PARKER, C. J., says: "If this doctrine were admitted, a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn; but unlike that instrument, in that the materials would not remain the same." In *Gardner v. McEwon*, 19 N. Y. 123, it was decided that a mortgage of all the goods of a specified description then in a store, or that thereafter might be brought there, though void as to the latter, might be good as to the rest. In *Hamilton v. Rogers*, 8 Md. 301, it was held that a mortgage of goods in a store, "together with all the renewals and substitutions for the same in any part or parts thereof," did not convey subsequently acquired goods so as to entitle the mortgagee to an action at law against the party seizing them. So in Kentucky it was held that a mortgage of future-acquired chattels is valid only when the property mortgaged may be regarded as a part of or accretion to the property in the actual or legal possession of the mortgagor at the time of making the mortgage. *Wilson v. Seibert*, 8 Am. Law Reg. (N. S.) 608. The same rule is recognized

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in New Jersey. *Looker v. Peckwell*, 38 N. J. L. 253. It was so held in *Parker v. Jacobs*, 14 S. C. 112; s. c., 37 Am. Rep. 724.

While at common law the mortgage covers the existent property of the mortgagor and does not transfer any right to after-acquired property, it is otherwise in equity. Though that court recognizes the rule of the common law, yet it holds such conveyance operative as an executory agreement, binding on the property when acquired. The mortgagor holds the property as trustee, and equity enforces the trust. In some cases the decision rests upon the grounds of an equitable lien. In *Mitchell v. Winslow*, 2 Story, 630, it is said by STORY, J., "that whenever parties, by their contract, intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquire a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy." But without particularly considering the different reasons given in equity in support of its exercise of jurisdiction, it is sufficient to remark that in all cases it recognizes the rule at common law as in full force.

But though this disposition of after-acquired property is *per se* inoperative, "such disposition," remarks TINDAL, C. J., in *Lunn v. Thornton*, 1 Man., Gran. and Scott, 383, "may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired." But the new act must be an act done by the grantor for the avowed object and with the view of carrying the former grant or disposition into effect. "Lord Bacon's language is," continues the chief justice, "there must be some new act or conveyance, to give life and vigor to the declaration precedent, which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some new act to be done by the grantor in furtherance of the original disposition." In that case there being no new act done by the grantor indicating his intention that the goods should pass under the former bill of sale, the case was held to fall under the general rule.

In the case at bar, the subsequently purchased goods were in the Chandler House commingled with those there at the date of the mort-

gage ; the plaintiff having the mortgage was residing as a boarder in the house. The mortgagor delivered the newly-purchased goods to the plaintiff as security under the mortgage, but retained the possession and control of the same "without denial or interruption" on her part by the express terms of the mortgage.

The inquiry then arises whether here is any new act, within the decisions in *Lunn v. Thornton*, and *Jones v. Richardson*, which perfects the title of the mortgagee in the after-acquired goods. The mortgage, though recorded, was only available as between the parties to it. The possession of the mortgagee was instantaneous. It instantly reverted to the mortgagor. Now, as has been seen, the plaintiff acquired no title under the mortgage. There is no compliance with the other statutory alternative, possession and retention of the mortgaged property by the mortgagee. The new act was merely momentary, which, there being no retention of possession, conveyed no title under the statute. It was no act which conveyed title.

In *Jones v. Richardson*, the defendant claimed to hold under a mortgage intended to hold after-acquired goods. "He did not prove," observes DEWEY, J., "nor offer to prove any act done by the mortgagor, after the mortgage deed was executed by which he ratified the same as to subsequently-acquired property. All he offered to prove was that he had taken possession of the goods before the attachment. But this evidently was irrelevant, as it was held to be by the arbitrator. But if he had proved that the mortgagor had delivered possession to him of the goods in question, to hold the same under the mortgage, that would not have availed him against the plaintiff, although it might be good against the mortgagor." The court then refers to the statute of Massachusetts, which is similar to that in this State, and then proceeds as follows: "Now it is clear, we think, that the record of the mortgage deed is no sufficient notice of a legal incumbrance as to subsequently acquired property ; because by law, no such property could be sold or conveyed thereby ; and it would furnish no notice that any property would be afterwards purchased, or if purchased, that any act would be done to ratify the grant in that respect. As to such property therefore the mortgage could not be valid, except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee, with the intention to ratify the mortgage, and the mortgagee retained open possession of the same until the time of the at-

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tachment." This case determines the case at bar. There was a formal delivery, but no retention of possession of the subsequently purchased goods, in that case nor in this. In *Brown v. Thompson*, 59 Me. 373, a mortgage was given to secure after-acquired goods as well as those then in the store. The goods were removed to another store. An indorsement was then made to the effect that the mortgage should cover the stock removed. The mortgage with the indorsement was recorded. Here was a new act, the indorsement on the mortgage, which becoming part of the mortgage and recorded, conveyed a good title to the goods in the store when the indorsement was made. In *Rowley v. Rice*, 11 Metc. 333, there was a mortgage of after-acquired goods, which before the attachment were delivered to and retained by the mortgagee, with authority to sell the same. "The facts show," remarks SHAW, C. J., "all the elements of a new, distinct and substantive agreement to hypothecate the after-acquired goods, sufficient of itself to give title." The plaintiff held title as pledgee and not as mortgagee; the court adding that when an act is voidable, it may be ratified, but if actually void and the act of ratification be of itself sufficient to convey title, it will inure as an original act. In *Moody v. Wright*, 13 Metc. 17, the same question again came before the court for consideration, and with the same result. "A stipulation that future acquired property shall be holden as security for some present engagement," observes DEWEY, J., "is an executory agreement of such a character that the creditor with whom it is made may under it take the property into his possession, when it comes into existence and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take into his possession before an attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement may hold the same; but until such an act done by him, he has no title to the same; and that such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge." The authorities are uniform in requiring not merely delivery but retention of the property delivered as indispensable to the perfection of the mortgagee's title, whether the mortgage purports to convey after-acquired property, or should be unrecorded. *Wright v. Tellow*, 99 Mass. 397.

The possession of the plaintiff was but instantaneous. It was re-
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sumed by the mortgagor. But a concurrent possession by the mortgagor and mortgagee is insufficient. There must be a substantial change of the possession. The cases of *Flagg v. Pierce*, 58 N. H. 348, and *Sumner v. Dalton*, id. 296, are precisely in point. "Constructive possession," observes BOARDMAN, J., in *Crandall v. Brown*, 18 Hun, 461, "cannot be taken under a chattel mortgage. The right to possession is by virtue of the contract, and not as in an execution by virtue of the law. Possession must be taken, in fact * * a chattel mortgage is not an execution. Possession cannot be taken by words and inspection." In *National Bank v. Sprague*, 20 N. J. Eq. 27, ZABRISKIE, C. J., in referring to the statute of New Jersey and a mere nominal possession, says: "such possession does not satisfy the object nor comply with the words of the act; they required an actual and continued change of possession; these words would seem to be inserted expressly to provide against such a sham as this."

Judgment for defendant.

WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred. BARROWS, J., concurred in the result.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

TRANSATLANTIC FIRE INSURANCE COMPANY V. DORSEY.

(56 Md. 70)

Insurance — fire — explosion.

A fire insurance policy on sulphuric acid exempted the insurer from liability for loss by explosion unless fire ensued. The building in question was blown down by a storm, and the chamber containing the acid was broken and the acid was lost. The plaintiff claimed that the storm blew fire in contact with escaping gases and air and created an explosion, which caused the loss. *Held*, that in either case there was no liability under the policy.

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

John Carson, for appellant.

Charles J. Bonaparte, for appellee.

ALVEY, J. This was an action on a policy of insurance against loss by fire, issued by the appellants to the appellee, and which policy covered the appellee's stock in trade, consisting of sulphuric

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acid, and sulphur in bulk and in process of manufacture, contained in a certain building described in the policy. The policy contains a clause of exemption, declaring that the appellants shall not be liable for any loss that might be sustained from certain specified causes, among which is that "for any loss caused by the explosion of gunpowder or any explosive substance; nor by lightning (unless specially mentioned); or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning."

The claim for loss states, "that the fire originated in consequence of a violent tornado, blowing the fire through the steam drum, and so bringing it in contact with escaping gases and air, causing by the fire an explosion."

The proof shows that there was a severe storm raging at the time, and that the building was prostrated suddenly, and the fall was immediately preceded by a considerable report; but the witnesses were not agreed as to whether any portion of the building had been subject to the action of fire, except a few boards that fell against an adjoining lime kiln, from which some of the witnesses supposed they took fire. The loss for which claim is made is for sulphuric acid wasted from the pan or acid chamber, which was broken as it is supposed, in the fall of the building. The loss therefore for which claim is made is not for what was actually burned, but for loss occasioned as the consequence of a fire, alleged to have been insured against by the appellants.

There was considerable diversity of opinion among the witnesses as to the true cause of the loss; whether it was to be attributed to actual combustion of material outside of the furnace or burners; to explosion of some explosive substance; or to the prostration of the building by the storm, without the agency of fire.

If the loss was occasioned by fire as contended by the appellee, there is no pretense that the fire originated anywhere beyond the establishment containing the articles covered by the insurance. The theory of the appellee is, as maintained by a scientific expert examined upon the subject, that the damage to the property insured was the immediate result of the violent and instantaneous conflagration of sublimed sulphur diffused through the atmosphere immediately surrounding the boiler and sulphur burners; and that such conflagration was caused by flames blown out from the fire in

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the furnace or burners, by the storm then raging, and brought in contact with the diffused particles of sulphur. That while this rapid combustion could not be accurately termed an explosion, sublimed sulphur not being an explosive substance, it would have some of the incidents of an explosion; among these a report and concussion in the air, as described by some of the appellee's witnesses. That this sudden combustion produced a vacuum, which was followed by a collapse, and the fall of the building, breaking the acid chamber, and causing the waste of the contents.

On the other hand the appellants gave proof tending to show that the building was suddenly prostrated by the violence of the storm, without the agency of fire, and that all the loss sustained was attributable to the fall of the building. And further that from the appearance and condition of the ruins, if combustion was in fact the moving cause of the fall of the building, it must have been by explosion, and not by producing a collapse, as maintained on the part of the appellee.

The court below instructed the jury, that if they found that the loss sustained was of the subject-matter insured, and "that such destruction or injury was directly caused by, or the result of fire," then the appellee was entitled to recover. The jury found for the appellee, and therefore, as we must assume, they found that the loss was directly caused by or was the result of fire. And the question is, whether this instruction was correct, in view of all the evidence in the case.

It is certainly true as a rule of construction, that where an insurance company attempts to limit or restrict the general operation of its contract of insurance, by special exceptions or exemptions, it is bound to do so by clear and explicit terms; and if it fail in this, it cannot complain that the party insured is given the benefit of any doubt that may be reasonably raised as to the nature or extent of the exception from the general risk assumed. Where however the terms of the contract are clear and explicit, they must be allowed their full force and effect; there being no distinction in this respect between the contract of insurance and any other contract.

In this case the exception of liability for explosions of any kind, is certainly very broad and comprehensive; but that exception must not be so construed as to defeat the main and principal object of the insurance.

If the prostration of the building and the consequent breaking

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of the acid chamber were produced by an explosion of any kind, without being caused by a precedent conflagration within the meaning of the policy, then there is clearly no liability on the part of the appellants. In other words the loss occasioned by explosion alone would not be covered by the risk assumed by the insurers. It is not pretended that any part of the loss sustained was occasioned by fire that ensued the fall of the building. If such had been the case, the loss thus produced would have been covered by the policy, even though the fire had originated in an explosion, and this by the terms of the exception. But where a fire has occurred, and is in progress, the effects of which are covered by the policy, and an explosion takes place as an incident or result thereof — so as to increase the loss — whether the whole of the damage or loss thus produced can be regarded as within the protection of the insurance, in a case where the policy contains the exemption from liability for explosions, has been the subject of some diversity of judicial opinion. We think, however, both upon reason and the established rules of construction, that such loss should be regarded as within the risk assumed by the insurers. In such case the fire is the direct and efficient cause of the loss, and the explosion but the incident, and if the insurers intend to exclude such liability, they must do so by plain and unambiguous terms. Indeed the difficulty in such case, of ascertaining and distinguishing the loss to be attributed to the fire from that caused by the explosion — separating the actual or probable effects of the explosion from those produced, or that would have been produced, but for the explosion, by fire alone — at once furnishes strong reason for including the effects of explosion in the loss occasioned by the precedent fire, producing the explosion. The contrary construction would do much to impair the security that should be afforded by policies containing the clause in question; and especially would this be so, if what was said in the case of *Stanley v. West. Ins. Co.*, L. R., 3 Exch. 71, were adopted; that is to say, that the *onus* in such case would be upon the insured to show the exact extent of the loss by fire as distinguished from that produced by the explosion; and his failure to do that would result in his misfortune rather than that of the insurers.

The case of *Briggs v. Ins. Co.*, 53 N. Y. 446, presents some features analogous to those of the present case. There the policy was upon certain machinery used for rectifying spirits. It contained a clause exempting the company from liability for losses

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“caused by lightning, or explosions of any kind, unless fire ensued, and then for the loss or damage by fire only.” Vapors escaped from the works, and came in contact with the flame of a lighted lamp in the room, and an explosion ensued which nearly destroyed the entire building and machinery. A fire resulted which occasioned some damage, but small in comparison with that caused by the explosion. The Court of Appeals of New York held, that the contact of the vapor in the room with the burning lamp was not a fire within the meaning of the risk assumed, and while it was held that the company was liable for the damage done by the fire which followed the explosion, it was held not to be liable for the loss occasioned by the explosion itself. It was suggested however, that if the building had been on fire, and in the course of the conflagration an explosion had occurred the company might have been liable.

So in the case of the *Ins. Co. v. Fbote*, 22 Ohio St. 340, the policy contained an exception of liability for “any loss or damage occasioned by or resulting from any explosion whatever.” The insurance was upon a stock of liquors in a liquor store, with privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The fire, by which the building and stock of merchandise were consumed, was occasioned by and resulted from an explosion of vapor, arising from the process of rectifying whiskey, mixed with the atmosphere of the still room, and which explosion was caused by this mixture coming in contact with a burning gas-jet in the room. It was there held that the fire thus originating was within the exception, and the company consequently was not liable; it not being provided, as in the present case, that the insurer should be liable for all loss by fire ensuing the explosion.

There is often difficulty experienced in these cases in accurately defining the term “explosion.” As was said in the case of *Ins. Co. v. Fbote*, just referred to, we all understand that the term is not used as a synonym of combustion. It has at least some distinctive characteristics. An explosion produced by ignition, according to common understanding, may be accurately enough described for practical purposes as a sudden and rapid combustion, causing a violent expansion of the air, and producing a report more or less loud, according to the resistance offered. That it greatly varies in its degrees of violence and the effects produced, is a fact

fully within the experience of every one. We must suppose that the term was employed in the policy in its ordinary and popular meaning; and it is a question for the jury to determine in all such cases whether there has been an explosion, how and by what means produced, and whether the loss sustained was directly caused by the explosion, or by an antecedent or subsequent fire, within the risk assumed by the insurers.

Here the question of explosion, as the direct cause of the loss, was entirely ignored by the first of the appellee's prayers, which was granted by the court. The jury were instructed that if they found that the commodities of the appellee were destroyed or injured in the manner testified to by the witnesses, and "that such destruction or injury was directly caused by, or the result of fire, the plaintiff was entitled to recover." By the terms of this instruction, if the fire had originated simultaneously with an explosion and terminated therewith, or had been communicated to some explosive substance coming in contact with the fire in the furnace or the sulphur burners, without producing any other effect than that produced by the explosion itself, the injury would have been caused, if not directly by, certainly as the result of fire; and the jury likely so understood the instruction. A lighted match coming in contact with a keg of powder would certainly produce an explosion, and as the explosion would be produced by fire, all the injury caused thereby might well be said to be directly caused by fire, or be the result thereof; and yet the burning match could no more be said to be the fire insured against than the burning lamp or gas-jet in the cases to which we have referred.

We think therefore that the first prayer of the appellee should not have been granted in the form in which it was presented. The question whether the loss was caused by an explosion, and not by fire, according to the distinction we have stated, should have been submitted to the jury in more explicit terms than was done by the instruction as given. The second instruction given at the instance of the appellee is free from objection; and the first instruction, modified as we have indicated, together with the second prayer of the appellee, and the first prayer on the part of the appellants, which was granted, will place the case fully and fairly before the jury.

The appellants offered a number of prayers, which were rejected by the court below, and upon careful examination of them, we

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think there was no error committed in their refusal. By the fifth of these prayers the court was requested to instruct the jury that the appellee could not recover, if there was no actual ignition of, or action of fire upon the sulphuric acid, for the loss of which the suit was brought. There was clearly no error in rejecting this proposition. If there was a fire within the meaning of the risk, and the loss was occasioned thereby, it is quite immaterial that the articles covered by the policy were not actually consumed or injured by contact with the flames. Loss by fire, within the meaning of the policy, will embrace all loss or damage of the subject of the insurance, which resulted directly from the occurrence of the fire. Therefore, though the acid was wasted by the crushing of the chamber, if the building fell as the result of a fire within the meaning of the policy the loss would be fairly covered by the insurance.

Without referring more particularly to the rejected prayers, we shall reverse the judgment, and direct a new trial.

Judgment reversed, and new trial ordered.

ROBINSON, J., dissented.

ARTHUR V. COLE.

(56 Md. 100.)

Deed—consideration—restraint of marriage.

A brother gratuitously deeded to his two sisters a leasehold property, to hold the same as tenants in common for both lives, with remainder to the survivor for life; or so long as both should remain unmarried, and from and after the marriage of either, then to the one remaining unmarried for life. *Held*, not invalid as in restraint of marriage.

EJECTMENT. The opinion states the case. The defendant had judgment below.

William George and Joseph C. Boyd, for appellant.

Thomas R. Clendinen, for appellee.

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MILLER, J. This case turns upon the construction and effect of the deed of the 29th of October, 1868. By that deed William H. Cole, in consideration of one dime, and natural love and affection, conveyed a small leasehold property in the City of Baltimore, to his two sisters, Martha and Elizabeth, "to have and to hold the same unto the said Martha and Elizabeth, as tenants in common, so long as they both shall live, and from and after the death of either of them, then unto the survivor so long as she shall live, and no longer, or so long as they both shall remain unmarried, and from and after the marriage of either of them, then unto the one remaining unmarried so long as she shall live or remain unmarried, and no longer." Martha married in 1873, and Elizabeth who remained, and still remains unmarried, took exclusive possession of the property, and denies that Martha since her marriage has any title to or interest therein. In September, 1878, Martha, by her husband and next friend, brought this action of ejectment to recover an undivided moiety of the premises, and insists that under the deed she took an absolute life estate, and that the limitation over in case of her marriage is "a condition subsequent, and being in restraint of marriage generally is against public policy, and void.

This is a subject that has been fruitful of discussion, and indeed of conflicting decisions. There seems however a general concurrence of authority both in England and in this country in support of the position, that if to a gift or bequest of personal property to a person other than the wife or husband of the donor, there be annexed a condition subsequent, that is a condition by which an estate previously given and vested is to be divested or forfeited upon marriage generally of the donee, such condition is void, whether there be a gift over or not. The doctrine that conditions in restraint of marriage are void, was derived from the civil law, and though it still prevails, and is everywhere recognized and enforced with greater or less strictness, some of the English judges in recent cases have suggested that the reason upon which the doctrine was originally founded has ceased to exist. *Allen v. Jackson*, L. R., 1 Ch.Div. 399; *Jones v. Jones*, L. R., 1 Q. B.Div.279. But no case has yet gone to the extent of repudiating the doctrine altogether, though the tendency of modern decisions perhaps is not to extend it, nor to strive to bring within its operation cases which by fair and just construction fall under the well-recognized distinc-

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tions and exceptions. One of these distinctions sustained by the great preponderance of authority is that between a limitation and a condition subsequent, or in other words, between the language by which the duration of an estate or interest is prescribed, and that by which an estate previously created is cut down, defeated, or divested. One of the cases in which this distinction is forcibly stated is *Heath v. Lewis*, 3 DeG., McN. & G. 954. In that case a testator bequeathed an annuity to an unmarried woman "during the term of her natural life, if she shall so long remain unmarried." The annuitant, after enjoying the annuity for some years, married, and the question was whether the annuity was determined by her marriage. The Lord Justice KNIGHT BRUCE said: "It must be agreed on all hands that it is by the English law competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry the annuity will thereupon cease. But this proposition has been advanced — a proposition which if true (and I do not deny its truth), is perhaps not creditable to the English law — that if a man gives an annuity to a woman who has never married, for life, and afterward declare that if she shall marry the annuity shall be forfeited, the condition is void and she may yet marry as often as she will and yet retain her annuity. Such is the state of our English law on this subject said, and perhaps truly, to be; and the question argued before us has been to which of these two classes the gift in this will belongs, being a gift of an annuity to a single lady 'during the term of her natural life if she shall so long remain unmarried,' this language being the technical and proper language of limitation as distinguished from condition long known to the English law and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation as distinguished from a condition, and that the annuity ceased when the lady married."

In *Moreley v. Rennoldson*, 2 Hare, 570, a testator by a codicil declared that his daughter should not marry, and in case of her marriage or death gave the property bequeathed to her by his will over to other legatees. It was held that this was a condition subsequent, creating a general restraint upon marriage and therefore void; but in disposing of the case the vice-chancellor, Sir J. WIGRAM, after examining the authorities, said that the gift until marriage and when the party marries, then over, is without doubt a valid limita-

tion, for in such case there is nothing to give an interest beyond the marriage. "If you suppose the case of a gift of a certain interest and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation; but if the gift is until marriage and no longer, there is nothing to carry the gift beyond the marriage."

In *Lloyd v. Lloyd*, 2 Sim. N. S. 255, a testator gave an annuity to his wife and a stranger for their joint lives, and at the death of either her share to go to the survivor, and then added "and in case either should marry or live in adultery, then her share shall pass to the other," and should both marry then their shares shall pass to his nephew. It was held that by these words a condition subsequent was annexed to an estate for life, which was good as to the widow but void as to the stranger; but the Vice-Chancellor KINDERSLEY said: "With regard either to his wife or to any other woman, a testator may make a gift so long as she shall remain single; but if he first gives a life estate to a single woman, a stranger to him, and then annexes a condition that in case she marries at all, it shall go over, that being in general restraint of marriage, is not a good condition." This case which was much relied on by the appellant's counsel is important only as showing that in the opinion of the court the words used in that will created a condition subsequent; for the distinction between a condition of that description and a limitation is plainly recognized.

In *Bellairs v. Bellairs*, L. R., 18 Eq. 510, a testator by his will directed his trustees to divide the income arising from the sale of certain real and personal estate and to pay the same in certain shares to his seven children, four of whom were daughters. Then by a codicil he declared that on the marriage of either of two of his daughters (to whom ten shares each had been given by the will), the bequests of the shares so given to them and each of them, shall absolutely cease and be void, and she shall receive four shares only, and to the one that shall remain unmarried he gave thirteen shares, directed the same to be reduced to four on her marriage, and on the marriage of both he directed that the twelve over-plus shares should fall into and form part of his residuary estate. One of these daughters married and the master of the rolls, Sir G. JESSEL, after some hesitation and with much regret, decided that the language of the codicil created a condition of forfeiture which was *in terrorem* and void, but he admitted that if the bequest had been put in the form

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of a limitation, that is, if the life interest had been given to the young lady until she married and then over, its validity could not be disputed.

In *Grace v. Webb*, 2 Phillips, 701, there was a covenant by John Webb to pay to Eliza Castle, "during the term of her natural life, subject to the proviso hereinafter contained, an annuity of £40," and the proviso was, "that in case the said Eliza shall at any time hereafter happen to marry, then from and immediately after her marriage the said annuity of £40 shall be and is hereby reduced to £20," which shall be paid to her during the remainder of her life. The Vice-Chancellor SHADWELL held that the proviso reducing the annuity was illegal and void as a restraint on marriage, but on appeal this decision was reversed by Lord Chancellor COTTENHAM, who held that it was a grant of £40 per annum until marriage and after that event of £20 for life, and that such a gift was perfectly lawful. "There can be no doubt," said his lordship, "that marriage may be made the ground of a limitation ceasing or commencing. The argument in favor of this claim assumes that there is an unqualified grant of an annuity of £40 per annum for life and an attempt to defeat the gift by an illegal condition subsequent. This proposition, I think, fails in all its parts, for there is not any unqualified gift of an annuity of £40 for life; the contract and obligation is to pay to Eliza Castle during her life, subject to the proviso hereinafter contained, an annuity of £40 at certain times specified. The contract and obligation is not absolute and unqualified but explained, qualified and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is therefore to pay £40 per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law as acted upon in the cases referred to."

These authorities, selected from the great number of decisions upon this general subject, because of their special bearing on the case before us, are quite sufficient to establish the distinction referred to, and it only remains to consider whether this deed contains any such condition as the law condemns. In determining this the whole instrument must be examined without regard to particular expressions or the order in which they occur, for it has been held that even the word "provided," which, as we all know, is an appropriate word to create a common-law condition, does not invari-

ably or of necessity do so; on the contrary, it may give way to the intent of the party as gathered from the entire instrument and be taken as expressing a limitation in trust. *Stanley v. Colt*, 5 Wall. 119. But there is no such strong word in the present deed, and the intention of the grantor in executing it is very apparent. The purpose of the brother evidently was not to restrain the marriage or promote the celibacy of his sisters, but to give them a small property as a home or support until they should severally marry and have husbands to maintain them. It is hardly possible to conceive that there is any thing immoral or illegal in such a purpose, and in our opinion it has been carried out by this deed without infringing any rule of law. We find in this conveyance no absolute and unqualified gift for life. The grant is to them as tenants in common so long as they shall both live or so long as they shall both remain unmarried. The latter clause is an *integral* part of the grant and not a condition upon which the previous grant is to be defeated. Its object was not to impose a penalty but to mark the extent of the interest given. Read in the natural order in which the events must occur, and according to the manifest intent of the grantor appearing on the face of the deed, it is a gift to his sisters during their single lives only, and when either marries or dies, whichever event shall first occur, her share is to go to the survivor during her single life and no longer. It would be strange if there was any thing in the law prohibiting a brother, having entire control of his own property, from making such a provision for his unmarried sisters, and we are glad to find upon a careful examination of the cases, that the weight of authority fully sustains the validity of such a grant.

In thus disposing of the case, the Maryland authorities, all of which have been cited in argument, have of course been examined. It is not necessary to review them, as there is nothing in any of them in conflict with what we now decide. The present case depends entirely upon the construction of this particular deed. We have also regarded the deed as a conveyance of personal property, because by our law a leasehold interest in land, though under a lease for ninety-nine years, renewable forever, is personal estate subject to all the rules governing that species of property, save in so far as those rules have been modified by express legislation.

The rulings of the court below denied the right of the plaintiff to recover, and it follows from what we have said that the judgment must be affirmed.

Judgment affirmed.

Philadelphia, Wilmington and Baltimore Railroad Company v. Lehman.

PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COM-
PANY v. LEHMAN.

(56 Md. 302.)

Sunday — carrying cattle on.

It is lawful for a common carrier to transport cattle on Sunday. (*See note, page 418.*)

ACTION of damages for delay in transporting cattle. The opinion states the case. The plaintiff had judgment below.

John J. Donaldson and Henry E. Wootton, for appellant.

Wm. A. Fisher, for appellee.

ALVEY, J. The first question that presents itself on this record is that raised by demurrer to the plaintiffs' declaration. The declaration alleges that the defendant is a common carrier for hire; that on the 28th of July, 1878, about the hour of four o'clock, P. M., the defendant received from the Baltimore and Ohio Railroad Company thirteen cars loaded with cattle, belonging to the plaintiffs, to be transported by the defendant, for a reward for that purpose paid or to be paid by the plaintiffs to the defendant, with reasonable dispatch over the road of the defendant; but the defendant did not nor would transport the same with reasonable dispatch, but detained the same upon its road, in the city of Baltimore, from the time of the delivery to the defendant until about half past twelve o'clock, A. M., of the morning of Monday, July 29, 1878. By reason whereof the said cars, so laden with cattle, failed to reach Jersey City stock-yards, their point of destination, until the hour of three o'clock, P. M., of the day last mentioned, and too late for the market of that day; and the plaintiffs were compelled to retain the cattle until the market of Wednesday following, whereby a large shrinkage took place in the weight of the cattle, and deterioration of their condition, and the plaintiffs were put to great expense in feeding the cattle during the period of delay, and loss of time thereby, and suffered loss by reason of the decline in the market value of the cattle, etc.

The court below overruled the demurrer, and required the

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defendant to plead, and the question is, whether that ruling was correct.

As the defendant is charged with failure of duty in the exercise of its calling as a common carrier for hire, the question raised by the demurrer is, whether on a Sunday there was, in the absence of a special contract, a common-law duty imposed upon it, unrestricted and unaffected by statute, to carry or forward the cattle of the plaintiffs on that day, under the facts alleged in the declaration.

The declaration does not allege in terms that the cattle were delivered to the defendant for transportation on Sunday, but it alleges that the defendant received of the Baltimore and Ohio Railroad Company, a connecting road, the cattle on the 28th of July, 1878, to be transported with reasonable dispatch over its road. It is the duty of the court to notice the days of the week on which particular days of the month fall; and hence we know without averment, that the 28th of July, 1878, was Sunday. *Hoyle v. Cornwallis*, 1 Str. 387; *Kilgour v. Miles*, 6 G. & J. 268. And in the regular division of time Sunday embraces all of the twenty-four hours next ensuing the midnight of Saturday.

Supposing the defendant to have professed and held itself out as a common carrier of live stock on Sunday as on other days of the week, whether it would have been bound to accept for carriage from the plaintiffs, or from a connecting road, stock offered on a Sunday, is a question not necessary to be decided. It is alleged that the plaintiffs' stock was offered on Sunday, and actually received by the defendant to be transported over its road with reasonable dispatch. The action is founded upon the common-law duty and liability of the defendant as a common carrier of live stock, and not upon any special contract either as between the plaintiffs and defendant, or as between the defendant and other connecting roads. It is alleged that the defendant detained the stock on its road at Baltimore for a period of about seven or eight hours, after receiving it to be transported, whereby loss and injury accrued to the plaintiffs; and the question is, whether the defendant was justified in the detention by the fact that the stock was received upon the road on Sunday, about four o'clock, P. M.

Most if not all of the States of the Union have what are familiarly known as Sunday laws; and while they may differ in their phraseology and the penalties imposed, they are substantially the same in their general scope and provision—all looking to

keeping the day sacred, and as one of rest from secular employments. Of these laws there has been great diversity of interpretation, some courts holding to them with great strictness, while others have construed them with considerable liberality—and especially in cases where by strict construction, impediments and embarrassments would be raised to the great carrying business of the country. In this court we have had no case analogous to the present; but looking to what has been decided elsewhere, we have no doubt in concluding that our Sunday law, as found in the Code, art. 30, sec. 178, has no application to this case whatever. That statute forbids all persons to “work or to do any bodily labor on the Lord’s day, commonly called Sunday;” and it provides that no person shall command or willingly suffer any of his servants to do any manner of work or labor on that day—works of necessity and charity always excepted—and a small penalty is prescribed for a breach of the statute.

According to the principles of the common law, applicable to common carriers, the defendant having accepted the stock to be transported over its road, in the usual course of transit, it at once became its duty to forward the same without unnecessary delay or detention. Its obligation was to carry according to its public profession, and the conveniences at its command. *Johnson v. Midland R. Co.*, 4 Exch. 367. And if injury be sustained, by reason of any neglect of this duty, or other wrongful act, in the carrying and delivery of the cattle, the fact of their having been received to be carried, or having been carried on Sunday, can afford no excuse to the defendant, or exoneration from liability. The carrying forward of the cattle by the defendant on Sunday was not illegal; it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute. And that being the case, there is no ground for the excuse relied on by the defendant. *Powhatan Steamboat Co. v. Railroad Co.*, 24 How. 247, 253; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; s. c., 17 Am. Rep. 221; *Flagg v. Millbury*, 4 Cush. 243. And even upon the supposition that the plaintiffs were violating the law in having their cattle transported on a Sunday, it is well settled that the defendant could not avail itself of such infraction of the law by the plaintiffs, as a defense to an action for the consequences of a wrong or negligence of its own. *Phil., Wilm. & Balto. R. Co. v. Steam Towboat Co.*, 23 How. 209; *Mohney v. Cook*, 26 Penn. St. 342; *Sutton v. Town of*

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Wauwatosa, 29 Wis. 21; s. c., 9 Am. Rep. 534; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; s. c., 17 Am. Rep. 221. The court below was clearly right therefore in overruling the demurrer of the defendant to the declaration of the plaintiffs.

[Omitting other questions. But on another point,]

Judgment reversed, and new trial awarded.

NOTE BY THE REPORTER — In *Commonwealth v. Louisville & Nashville R. Co.*, Kentucky Court of Appeals, May 27, 1882, 1 Ky. Law. Jour. 611, it was held that running railway trains on Sunday is a work of necessity. The court said: "Railroad companies, as carriers of passengers, furnish at this day almost every accommodation to the traveller that is to be found in the hotels of the country. His meals as well as sleeping apartments are often furnished him; and to require the train when on its line of travel to delay its journey that the passenger may go to a hotel to enjoy the Sabbath, where the same labor is required to be performed for him as upon the train, or to require him to remain on the train and there live as he would at the hotel, would certainly not carry out the purpose of the law; and besides, the necessity of reaching his home or place of destination must necessarily exist in so many instances as to make it indispensable that the train should pursue its way. So of the trains transporting goods, merchandise, live stock, fruits, vegetables, etc., that by reason of delay would work great injury to parties interested. A private carriage in which is the owner or his family, driven by one who is employed by the month or year, to the church in which the owner worships, or to the house of his friend or relative on the Sabbath, is not in violation of the statute. So in reference to the use of street railroads in towns and cities on the Sabbath day. Those who have not the means of providing their own horses or carriages travel upon street-cars to their place of worship, or to visit their friends and acquaintances; and such is the apparent necessity in all such cases that no inquiry will be directed as to the business or destination of the traveller, whether on the one car or the other, nor will an inquiry be directed as to the character of the freight being transported. Nor will the person desiring to hire the horse from the livery-stable be compelled to disclose the purpose in view in order to protect the keeper from the penalty of the law. Such employments are necessary, and not within the inhibition of the statute. The common sense, as well as the moral sentiment of the country, will suggest that the merchant who sells his goods, or the farmer who follows his plow, or the carpenter who labors upon the building, or the saloon keeper who sells his liquors on Sunday, are each and all violating the law by which it is made penal to follow the ordinary avocations of life on Sunday. The ordinary usages and customs of the country teach us that to pursue such employments on the Sabbath is wrong. Every man can realize the distinction between pursuing such avocations and that of transporting the traveller to his home or the pursuit of such employments as must result from the necessary practical wants of trade." See *State v. Baltimore and Ohio R. Co.*, 15 W. Va. 382; s. c., 36 Am. Rep. 808.

In *Yonock v. State*, Indiana Supreme Court, March, 1882, it was held that repairing a railway track on Sunday may be a work of necessity.

WOODYEAR V. SCHAEFER.

(57 Md. 1.)

Water and water-course — injunction against fouling — joint wrong-doers.

The defendant, proprietor of a slaughter-house on a stream, had for eight years been in the habit of discharging the blood and offal into the stream. Other persons, proprietors of slaughter-houses, breweries, soap factories and the like, also discharged the refuse of their establishments in like manner. The effect was to damage the plaintiff, proprietor of a flour mill which had been for thirty years established lower down the stream, by rendering the water offensive, tainting the air, and injuring the health of his operatives. *Held*, that the defendant should be enjoined.*

BILL for injunction. The opinion states the case. The defendant had judgment below.

Sebastian Brown and *J. Nevett Steele*, for appellant.

H. P. Jordan and *R. J. Gittings*, for appellee.

MAGRUDER, J. The bill was filed by the appellant to obtain an injunction to restrain a nuisance. The appellant has been since 1853 the owner and proprietor of a large flour mill, in Baltimore city, on Gwynn's falls, below its junction with a small stream called Gwynn's run. Before the purchase of the mill, he had operated it from about 1849, and a mill on that site had been operated for over fifty years.

The appellee (the defendant below) is a butcher, having a slaughter-house on Gwynn's run in Baltimore county, about a mile above the mill.

The complaint is that the appellee for several years past, and up to the time of filing the bill, has emptied and still continues to empty or allows to flow into the said run, the blood from slaughtered animals, and also continuously discharges from his slaughter-house into the run, the entrails and other offal from slaughtered animals, and that this blood and offal, naturally and necessarily by the flow of the stream, makes its way into the appellant's mill dam, and from that into the mill race, whereby the water in the race and its

* See *Penn. Coal Co. v. Sanderson*, 94 Penn. St. 408; s. c., 39 Am. Rep. 785; also *Canfield v. Andrew*, 54 Vt. 1; also *Robinson v. Black Diamond Coal Co.*, *ante*, p. 118; *Fraser v. Pendleton*, *post*.

banks are mixed with and covered by said animal matter, causing and creating a nuisance, the said matter decomposing and creating an offensive smell, at times unbearable; the atmosphere, filled with the stench, is not only disagreeable and uncomfortable to health, but it causes and tends to create disease; that this animal deposit becomes greater each year; that the run from the slaughter-house to the dam is little better than a cesspool; that as the deposit increases the stench increases; that until within two years, the appellant and his hands and operatives only suffered inconvenience and discomfort, but now, especially in the hot days of summer, the stench has made most of the operatives sick, even making the hands so sick as to be unable to retain their food, compelling them at times to quit the premises, whereby the mill has to be stopped, and to obtain an atmosphere that can be even endured, the flow of water to the mill has to be stopped, and the contents of the dam emptied into the falls; that the operatives complain of the discomforts connected with their employment, and that unless the nuisance shall be abated, it is only a question of time when the operations of the mill shall be compelled to cease; that the acts complained of are a nuisance, prejudice and lessen the value of the mill, and deprive the owner of a comfortable and reasonable enjoyment of it, and that he is without adequate remedy at law, and can only have full relief in equity, and an injunction is prayed restraining the appellee, his agents, employees and servants from emptying, depositing, discharging, or allowing to flow into Gwynn's run, from his premises any blood, entrails or offal from slaughtered animals.

The answer does not deny the condition of the stream as charged nor the effects produced thereby, but denies that any offensive matter is thrown in the stream by the appellee, that the only matter allowed to flow into the stream from his premises is beef's blood, in quantities not exceeding fifteen buckets full, upon an average, per week, which blood cannot be seen or detected in the waters of the said run over one hundred yards below the slaughter-house, and cannot cause any offensive deposit, or otherwise create a nuisance or injure the appellant; that if any cause of complaint exists, the appellant is himself responsible for it by damming up the stream, which if allowed to flow unobstructed would be free from cause of complaint, and by allowing vegetable matter to accumulate and decompose in the dam and race, and by not using proper appliances

to keep out offensive matter ; that on Gwynn's falls and the run there are a large number of slaughter-houses and other establishments, which (some for over thirty years, and nearly all for over twenty years), have used these streams as sewer-ways, and that the blood from all these slaughter-houses, and the refuse from breweries, soap and other factories, have flowed into these streams, for all this period of time, without complaint ; and that there are cattle scales over and adjoining the run, in which are kept large numbers of swine, from which large quantities of filth and refuse matter are washed and thrown into the run and carried down with the current ; that the appellant's remedy is at law and not in equity ; and that to grant him the relief prayed would be ruinous to a vast amount of property owned by butchers and others, and destructive to one of the most important branches of trade in the State, besides working a most grievous wrong to the appellee.

A vast mass of testimony was taken, which although somewhat conflicting as to the point whether any solid matter was thrown from the appellee's premises into the stream, yet establishes the offensive condition of the water of the run, and in the mill dam and race, quite as fully as the bill charges, and shows the condition of the air at the mill to be at times so offensive as to be practically unbearable, although at the same time showing other causes, besides the slaughter-house of the appellee, for the existence of the nuisance, there being a large number of slaughter-houses on the falls and run, besides breweries, soap and other factories, and the cattle scales, with the occasional addition of dead animals, and offal, and other offensive matter from various other sources. So that throwing out of consideration the fact of solid animal matter coming from the appellee's slaughter-house, which is shown to have been only an occasional occurrence, if it has existed at all, as it probably has in a measure, judging from all the evidence, we are left to the blood which is proved to have flowed regularly from the slaughter-house of the appellee, though in comparatively moderate quantities, as the principal contribution by the appellee, in common with a large number of others, to the serious injury and grievance from which the appellant is manifestly so great a sufferer.

So that the question to be decided is, can a court of equity intervene to stop the appellee from committing the acts which constitute such an inconsiderable part of the wrong complained of,

and which if stopped, would leave the appellant still suffering from almost as great a grievance as he is now subject to?

As to the right of the appellant to the free use of the water of the stream for the purposes or his mill there can be no doubt. The site has been used for the present mill, and one which it succeeded, uninterruptedly for fifty years or more. The appellant has carried it on since 1849, and has owned it since 1853, and the right to the free and unobstructed use of the water for the purpose of operating the mill has been maintained without pretense of objection or interference for all this long period, and has thus become a prescriptive right, which no prescriptive right to use the stream for a sewerway, if such exists, could countervail, for the one must be so used as not to impair or destroy the other. But the wrong complained of, and disclosed by the evidence, amounts to a public nuisance, for which there can be no prescription. *Wood on Nuis.*, § 724; *Com. v. Upton*, 6 Gray, 473; *Mills v. Hall*, 9 Wend. 315 (24 Am. Dec. 160).

But the appellee's slaughter-house was not erected until about 1874, and the pollution of the stream did not give any trouble of material importance until about eight years ago, since which time it has been gradually growing worse. It was natural for the complainant to bear evil as long as it was slight, rather than engage in a tedious and expensive litigation.

He could not be expected to sue until his right was materially interfered with. *Crosby v. Bessey*, 49 Me. 539.

If he had complained sooner he might have been unable to make out a case of such interference with the reasonable enjoyment of his property as would have entitled him to the aid of a court of equity. Until he received some substantial injury he could not be expected to sue, and so there could be no prescription as against his right to the free use of the water, until that right was interfered with for the purpose for which he used it, and then only to the extent of that interference.

The right of a riparian owner to have the water of a stream come to him in its natural purity, or in the condition in which he has been in the habit of using it for the purposes of his domestic use or of his business, is as well recognized as the right to have it flow to his land in its usual quantity. See *Wood on Nuis.*, § 677; *Gladfeller v. Walker*, 40 Md. 1, 13; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; 8 Eng. L. & Eq. 217; *Stockford Waterworks Co. v. Potter*, 7 H. & N. 159.

And where any prescriptive right to pollute a stream has been gained, it can only be maintained to the extent that it is shown to have injuriously affected the interest complaining.

In the case of *Goldsmid v. The Tunbridge Wells Imp. Commrs*, L. R., 1 Ch. App. 349, where the pollution of a stream, which had been going on for over twenty years, was complained of, and the continuance of the pollution was sought to be maintained on the ground of a prescriptive right, an injunction was maintained on the ground that the right to pollute the stream could only be acquired by a continuance of the discharge of the sewer, prejudicially affecting the estate, at least to some extent, for the period of twenty years, and that the discharge had not prejudicially affected the estate for so long a period. See *Moore v. Webb*, 1 C. B. (N. S.) 673.

In the case before us the appellant suffered no injury at all eight years ago, and could hardly be expected to go a mile away to look after the mode in which the appellee was conducting his business upon his premises, when he himself was subjected to no inconvenience, and could not look to the acts of the appellee as likely to subject him to loss.

It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained. Wood on Nuis., § 689; *Crossley v. Lightowler*, L. R., 3 Eq. 279; *Chipman v. Palmer*, 16 N. Y. Sup. Ct. 517; s. c., 77 N. Y. 51; s. c., 33 Am. Rep. 566.

The extent to which the appellee has contributed to the nuisance may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors in producing the mischief complained of. And it may only be after from year to year the number of contributors to the injury has greatly increased, that sufficient disturbance of the appellant's rights has been caused to justify a complaint.

One drop of poison in a person's cup may have no injurious effect. But when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow. It would not do to say that neither was to be held responsible.

In that state of facts, as in the one presented by this case, each element of contributive injury is a part of one common whole, and to stop the mischief of the whole, each part in detail must be arrested and removed.

The right to pure air is held to be a natural right, and as incident to the enjoyment of land. Its sensible pollution by the exercise of a noxious trade, whereby the comfortable enjoyment of property is diminished, is a nuisance, against which courts of equity will always, when the state of the facts applies, give relief, and such injury as is not fairly and reasonably incident to the ordinary use of property, and renders surrounding property physically uncomfortable, will be restrained. Wood on Nuis., § 791; *St. Helen's Sm. Co. v. Tipping*, 11 H. of L. Cas. 649; *Walter v. Selfe*, 4 Eng. L. & Eq. 20.

And the remedy in equity to prevent a nuisance is generally said to exist whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly recurring grievance. An injunction is the only effectual remedy to stop the injury. Adam's Eq. 211.

Especially is this the case when the injury is caused by so many, that it would be difficult to apportion the damage, or say how far any one may have contributed to the result, and so damages would likely be but nominal, and repeated actions, without any substantial benefit, might be the result.

This very difficulty in obtaining substantial damages was stated in *Clowes v. Staffordshire, etc., Co.*, L. R., 8 Ch. App. 125, to be a ground for relief by injunction. See *Lingwood v. Stowmarket Co.*, L. R., 1 Eq. 77.

Slaughter-houses are held to be *prima facie* nuisances (Wood on Nuis., § 504); and that where originally in a remote place, but the building of houses near by renders them noxious. *Rex v. Cross*, 2 C. & P. 483; *Catlin v. Valentine*, 9 Pai. 575; *Peck v. Elder*, 3 Sandf. 126; *Brady v. Weeks*, 3 Barb. 157.

It is held that blood running into a stream constitutes a nuisance that will be restrained. In *Atty-Gen. v. Stewart*, 5 C. E. Green, 419, the defendants were enjoined from allowing blood from slaughtered animals to run into a stream, on the ground that it was *per se* a pollution, and would render the stream offensive. In *Rex v. Neil*, 2 C. & P. 485, the right to stop nuisances in cases where many contribute, is thus stated: "It is not necessary that

a public nuisance should be injurious to health ; if there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, etc., but the presence of other nuisances will not justify any one of them ; for the more nuisances there were, the more fixed they would be ; however, one is not to be less subject to prosecution, because others are culpable."

The law governing the right to an injunction to restrain a nuisance is well stated in *Holsman v. Boiling Sp. Bl. Co.*, 1 McCarter (N. J. Ch.), 335, where a great many leading authorities are collected.

And the law is fully laid down by this court in *Hamilton v. Whitridge*, 11 Md. 128 ; *Adams v. Michael*, 38 id. 123 ; s. c., 17 Am. Rep. 516 ; and *Dittman v. Repp*, 50 Md. 516 ; s. c., 33 Am. Rep. 325.

And the doctrine is well settled that where the nuisance operates to destroy health, or impair the comfortable enjoyment of property, an action at law furnishes no adequate remedy, and protection by injunction must be given. Daniell's Ch. Pr., 1858 ; 2 Story's Eq. 926 ; 2 Johns. Ch. 166.

We think that the complainant has shown himself to have suffered greatly, and likely to suffer more in the future, from the nuisance to his property, whereby it is likely to become practically valueless, unless the injury is restrained. He will be entitled to the same relief against all the parties contributing to the injury, and as all are together contributing to the same result, if the injury does not cease upon the granting of the injunction in this case, he may be entitled to join in one case all who still continue the injury ; upon the principle of the case of *Thorpe v. Brumfitt*, L. R., 8 Ch. 656, where it is held, that the acts of several persons, acting separately, and without concert and entirely independent of each other, may together constitute a nuisance, when the acts of either one alone would not create it, and such persons may be joined as defendants in a bill for an injunction. And this illustration is given : "Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent ; and it is no defense to any person among the

hundred to say that what he does causes of itself no damage to the defendant." See Wood on Nuis., § 800.

It has been urged in argument, that to restrain the appellee and others engaged in the same occupation, from doing the acts complained of, will prove ruinous to their business, and destructive to a vast amount of capital invested in the business. But we do not think the apprehension is well founded. Experience and the necessity of the case have elsewhere applied the remedy in a manner entirely satisfactory to those engaged in the business, and to the great relief of the public; besides converting into a matter of revenue the refuse and offal before constituting an intolerable nuisance. The business of the appellant, and those situated like him, will certainly be destroyed, if the condition of things shown in this case is allowed to go on and increase, to say nothing of the interference with the comfort, health and development of the whole neighborhood affected by the pollution of the stream. Certainly there must be a remedy, and a prompt and thorough one, for such an evil in and adjacent to a large and rapidly growing city; and we know of no remedy equal to the emergency but that of the protective and preventive interference by injunction.

The appellee and those situated like him must learn to act upon the maxim, *sic utere tuo ut alienum non laedas*.

The *pro forma* decree below will therefore be reversed, and the cause remanded, in order that an injunction may be issued as prayed in the bill. Under the circumstances of the case we think the costs should be equally divided between the parties.

Decree reversed, and cause remanded.

NEWBOLD V. THE J. M. BRADSTREET & SON.

(37 Md. 38.)

Slander and libel — charge that merchant has executed mortgage.

Falsely to charge that a merchant has executed a chattel mortgage is not actionable *per se*, and special damage cannot be predicated of such a charge without explicit proof connecting it therewith.

ACTION of libel. The opinion states the point. The defendant had judgment below.

Newbold v. The J. M. Bradstreet & Son.

William Shepard Bryan, for appellants.*Sebastian Brown*, for appellee.

ALVEY, J. This is an action for what is supposed to be a libel published by the defendant, a corporation, of and concerning the plaintiffs in their business as merchants.

The plaintiffs are merchants in the city of Baltimore, dealers in glassware, and the defendant conducts a mercantile agency in the same city, the object of which is to furnish information to subscribers, respecting the credit and commercial standing of merchants. It appears that the plaintiffs had been for two years prior to January, 1878, subscribers to this agency. And in addition to furnishing information, as from an intelligence office, of the standing and credit of merchants, the defendant, for the benefit of its local patrons, printed and published a daily sheet or circular, under the title of "Bradstreets' Daily Sheet of Changes," devoted to showing the changes and transfers of titles to real and personal property, mortgages, judgments, etc., in the city of Baltimore. This sheet was circulated only among the subscribers to the agency in the city, numbering, according to the proof, from five hundred to one thousand. In the daily publication of January 15, 1878, which contained separate divisions or headings, designated, "mortgages," "chattels," "assignments," "deeds," "releases," "judgments," etc., under the heading "chattels," occurred the following: "Newbold & Sons to J. R. Burns," without any thing more in respect to that entry; and the plaintiffs allege that the meaning of the entry was, and that it was so understood among the subscribers to the agency, that the plaintiffs had made a chattel mortgage to J. R. Burns. The declaration contains averments of both general and special damages to the plaintiffs in their business as merchants, by reason of the publication. The case was tried upon the general issue, plea of not guilty of the wrongs alleged.

In the course of the trial there were sixteen bills of exception taken by the appellants, all but the last relating to questions of evidence. The court finally granted an instruction, that under the pleadings and evidence in the cause, the plaintiffs, the present appellants, were not entitled to recover.

[Omitting other matters.]

And having determined this question of evidence, we shall, in

the further consideration of the case, assume the evidence to be in, and that it clearly established the fact that the meaning of the words charged as libellous is, according to the plaintiffs' averment, that the plaintiffs had made a chattel mortgage to J. R. Burns. Taking this to be the meaning, and the plaintiffs can insist upon no other or larger meaning, *Barham's case*, 4 Co. 20; *Goldstein v. Foss*, 4 Bing. 489; *Williams v. Gardiner*, 1 M. & W. 249; *Brooms v. Gosden*, 1 C. B. 732; *Williams v. Stott*, 1 Cr. & M. 689; *Sellers v. Tile*, 4 B. & Cr. 655, it is clear, we think, that the alleged libel contains nothing that is actionable *per se*; that is, from which the law would infer damage, as being necessarily occasioned by the publication. That is the test, as we understand the authorities, as to the right to recover general damages in this class of cases. Townsh. Sl. & Libel, §§ 146 to 148 and 188; 2 Greenl. Ev., §§ 254, 256 and 420, and the authorities there cited. To say or publish of a merchant any thing that imputes insolvency, inability to pay his debts, the want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, is slanderous or libellous *per se*, if without justification, and general damages may be recovered. Such publication necessarily, in legal contemplation, tends to injure the credit and standing of the party of whom it is made. But we have been referred to no case, and have been able to find none in which it has been held, that to say of a merchant simply that he has made a chattel mortgage, without any thing more, as to amount, subject of the mortgage, or the occasion of it, is libellous or slanderous *per se*, and that damage therefrom is necessarily inferred. We think no such legal inference can in reason be indulged. Chattel mortgages, as well as the pledge of stocks and other securities, may be made by merchants and others without giving rise to any legal inference or presumption of insolvency, or that such an act will necessarily tend to impair or injure the credit and standing of the mortgagor or pledgor. Indeed we suppose it would be alarming to merchants and tradesmen to learn otherwise. -

All proof therefore of general damage, such as that stated in the sixth, eighth and fourteenth bills of exception, was properly excluded. It could only have been offered in case the libel were actionable *per se*; but not when it is only actionable with respect to such special damage as may be alleged. *Dicken v. Shepherd*, 22 Md. 399, 416; *Dixon v. Smith*, 5 H. & N. 450.

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Where the alleged libel is only actionable in respect to special damages it must appear to be of a character that the special damage alleged may be the natural and proximate, though not the necessary, consequence of the publication. 2 Greenl. Ev., § 420; Townsh. Sl. & Libel, § 197, and notes to that section. The special damage must be proved as laid, and any substantial variance between the allegation and proof will be fatal. It must also appear to be the natural and immediate consequence of the defendant's wrongful act; and if the special damage is alleged to consist in the refusal of a third person to deal with the plaintiff, or to give him credit, or in the action of any third person in enforcing obligations, evidence is not admissible of the declarations of such third person as to his reason or motive for so acting; the third person himself must be called to prove his motive; for the act without the reason or motive therefor is no evidence against the defendant. *Tilk v. Parsons*, 2 C. & P. 201; *Tunncliffe v. Moss*, 2 C. & K. 83; *Dixon v. Smith*, 5 H. & N. 450; *Dicken v. Shepherd*, 22 Md. 415; 2 Stark. on Sl. & Lib. 57, 58.

Now in this case the alleged libel not being actionable *per se*, but only in respect to the special damage alleged, it is quite clear, upon the principles we have just stated, that the offers of proof of special damage, contained in the ninth and tenth exceptions, were not admissible, and therefore properly excluded. There is no evidence whatever to show any connection between the acts of the parties named in those exceptions and the alleged libel, or that they ever saw it, or knew of its existence. Such evidence could furnish nothing more than a foundation for a mere conjecture as to the reasons upon which the parties acted.

[Minor considerations omitted.]

Upon the whole case, as disclosed by the record, we agree with the court below that the plaintiffs were not entitled to recover, and we shall therefore affirm the judgment, notwithstanding the errors to which we have referred.

Judgment affirmed.

CHESAPEAKE AND OHIO CANAL COMPANY V. COUNTY COMMISSIONERS OF ALLEGANY COUNTY.

(57 Md. 201.)

Municipal corporation — recovery over against original wrong-doer.

A traveller recovered judgment against a county for injuries sustained by him by reason of the defective condition of a canal bridge connecting a public highway. The canal company were legally bound to keep the bridge in repair; had notice of the suit; and joined in defending it. The county having paid the judgment, brought this action against the canal company to recover the amount so paid, and the costs and counsel fees incurred in that defense. *Held*, maintainable.*

ACTION to recover amount paid on a judgment and for counsel fees, etc. The opinion states the case. The plaintiff had judgment below.

J. N. Willison, W. M. Price and C. J. M. Gwinn, attorney-general, for appellant.

Benjamin A. Richmond, for appellee.

RITCHIE, J. This case has its origin in that of *Eyler* against the present appellee heretofore reviewed by this court and reported in 49 Md. 257; s. c., 33 Am. Rep. 249.

The facts of that case entering into this are, that *Eyler* brought his action against the said commissioners to recover damages for injuries sustained by reason of the defective condition of a bridge across the Chesapeake and Ohio canal over which he was riding on horseback. The road on which this bridge is situated is a public county road in Allegany county, and was such before the canal was made. This road the company, in constructing its canal, cut in two and connected again by the erection of a bridge, which bridge having been burnt down during the late war the company replaced it with the one on which the accident to *Eyler* occurred.

The county commissioners resisted that suit mainly on the ground that the canal company was by law bound to erect and keep in re-

* To same effect, *City of Brooklyn v. Brooklyn City R. Co.* (47 N. Y. 475), 7 Am. Rep. 408. Compare *City of Hartford v. Talcott*, ante.

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pair the said bridge, and that therefore the action should have been brought against it. This defense the learned judges below sustained; but on appeal to this court their judgment was reversed and Eyler was awarded a new trial.

When the record was sent back the case was removed to Garrett county and tried at the May Term, 1879, the trial resulting in a judgment for the sum of \$2,418 damages and \$379.58 costs against the commissioners.

This judgment the commissioners paid and thereupon instituted suit against the appellant to recover back the amount of the damages and costs so paid, with the interest accrued thereon, and also all the costs and counsel fees incurred by them in conducting the defense. In this suit they were successful, the jury finding a verdict in their favor for \$3,397.64, a sum which according to their calculation, as shown by a statement handed to the clerk by the foreman, was made up of the several items claimed as aforesaid. On this verdict judgment was entered, and from this judgment the present appeal was taken.

The *narr.* after setting out the facts relating to the bridge, Eyler's injuries, his suit and recovery thereon, proceeds with the averments that the obligation was upon the appellant to keep the said bridge in safe condition, that the appellant had notice of the said suit of Eyler and participated with the appellee in defending the same, and that it was bound in law to re-imburse the appellee all its said payments and expenditures, but that although so bound and notwithstanding demand therefor, had neglected and refused so to do.

The grounds upon which appellant seeks a reversal of the judgment below are succinctly stated as follows: First, that the canal company, if bound to erect a bridge at the time it cut through the road, which was about the year 1846, has been relieved of that duty by operation of our statutes since enacted, which declare that the county commissioners "shall have charge of and control over the county roads and bridges," and "may build and repair bridges and levy upon the property of the county therefor." Secondly, that even conceding the canal company was under obligation to keep the bridge in safe condition, the commissioners have no right of action over against the company, because this court in *Eyler's* case decides that the law imposed upon the commissioners a primary and unqualified obligation so far as the public is concerned to maintain and keep the bridge in proper repair, and that

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by virtue of this responsibility, and from having neither compelled the canal company to make the bridge safe for travel or done so themselves, the appellee was *in pari delicto* with the company, and as a joint wrong-doer could not recover or have contribution from the company. Thirdly, that no such notification was given the company of Eyler's suit as would render the judgment in that case binding upon it; and lastly, that if erroneous in the foregoing propositions and the appellant is affected at all by the litigation between Eyler and the commissioners, it is not concluded by it to the extent of the present judgment, because as it alleges a portion of this judgment is for costs and counsel fees incurred by the commissioners exclusively in their own behalf at the first trial with Eyler, and on the appeal therefrom, to neither of which proceedings, it claims, was it actually or constructively a party or notified to participate in them.

In expressing our views upon the points thus made by the appellant, its demurrers to appellee's *narr.* and replication, and its exception to the court's ruling on the prayers, are necessarily disposed of, and they need not therefore be considered in detail.

We do not think it open to dispute that the canal company was bound in law to connect again by suitable means any public road severed by it in constructing its canal. This was expressly decided in the case of *Leopard v. Ches. & Ohio C. Company*, 1 Gill, 229. The principles underlying that decision have been repeatedly recognized by this and other courts. They have been frequently applied in the excavation of streets and thoroughfares by railway companies and other disturbances of highways. The cases of *Dygert v. Schenck*, 23 Wend. 446; and of *Trustees of Burton Township v. Tuttle*, 30 Ohio St. 68, are especially analogous to the present one. They arose from injuries received by persons from the defective condition of bridges erected by the owners of the soil, where they had cut through public roads in constructing raceways to their mills.

In the former case *COWEN, J.*, in delivering the opinion of the court, thus defines the relations of the owner of the land and the public: "The defendant certainly committed no trespass in digging the ditch. It was his own soil. The only right adverse to his was one to have a common highway for the purposes of travel. All the public could require was that he should make and keep the road as good as it was before he dug the ditch. That he accomplished by building a substantial bridge originally which did not

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get out of repair for a number of years. The road however in the end proved to be less safe than it was when the bridge was first built, certainly less so than before the ditch was dug. In suffering this the defendant came short of his obligation to the public." In the Ohio case the court using almost the same language says: "The owner committed no trespass in digging the ditch through his own soil, but what the public can require is, that when he cuts the highway he should make and keep the road as good and safe for the public as it was before he dug the race. This can be accomplished by building and keeping a substantial bridge over the race at the crossing."

It may be here observed of the argument made by appellant's counsel that by the terms of its charter and necessary implication therefrom, the canal company was invested with the power to destroy public roads, where necessary to cross them, without liability to restore the means of travel over them, that the same claim was urged by the company's counsel in *Leopard's* case in 1 Gill, but was there distinctly negatived by the court in these words; "Such a proposition, we think, is not warranted by any act of legislation before us, and nothing but a grant of such a power in terms the most full and unequivocal would induce this court to believe that the legislatures referred to designed to confer it. Such terms are not to be found in the charter of the canal company, and we do not deem it necessary to use arguments or illustrations to show the non existence of such a power."

That the canal company itself has recognized its obligation to maintain a bridge where Eyler was injured is shown by its erection of one at that place shortly after it severed the road, and when it was burnt down during the war, by erecting the present one.

And in regard to this identical bridge, this court, in the case referred to in 49 Md., thus explicitly states the effect of previous decisions, and its own concurrence therewith: "It is therefore certain that the duty of maintaining and keeping this bridge in repair is devolved upon the canal company."

It is simply for the additional security and convenience of the public, that the county commissioners are held primarily responsible for the safe condition of the bridge, and not in anywise to lessen the obligation of the canal company to keep the same in repair.

And so far from meaning to imply, in declaring this duty of the commissioners toward the public to be primary, that the canal company could not be held answerable over to the commissioners,

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on page 276 of the opinion in 49 Md., we expressly say : " But while we thus maintain the liability of the commissioners to the appellant in this action, the canal company is by no means discharged from its obligation to maintain and repair this bridge ; nor are the commissioners left without remedy against the company. Upon the principles decided in many of the cases referred to, as also by the Supreme Court of the U. S., in *City of Chicago v. Robbins*, 2 Black, 418, and 4 Wall. 657, they may have their remedy against the company, for whatever damages may be recovered against them in this action."

Nor do we perceive from the nature and facts of this case any ground for defeating the appellee's suit, because of the principle of *pari delicto*.

It is well settled that as to the public or third persons, one of two parties may be held primarily responsible, without diminishing the obligations of the other, or impairing the right of action over against him. The facts from which the cases in 2 Black and 4 Wallace, just referred to arose were, that one Robbins having wrongfully left uncovered an excavation in the sidewalk next his lot, a certain Woodbury, in passing along the street, fell into it and was injured. For this injury he brought suit against the city of Chicago, and recovered a judgment, which the city was forced to pay. The city thereupon brought suit against Robbins, to recover from him the sum it had so paid. The court say, that although a municipal corporation, having the exclusive care and control of the streets, is obliged to see they are kept safe for the passage of persons and property, and is primarily liable to one who has been injured in consequence of default in this respect, the corporation has a clear remedy over against the party who has so used the street as to produce the injury.

The general rule of law relating to the defense of *pari delicto* is, that where two parties participate in the commission of a criminal act, and one party suffers damage thereby, he is not entitled to indemnity or contribution from the other party. But it is not every case even of *particeps criminis*, or of actual co-operation in the offense, in which a party is precluded from recovering of his co-delinquent. This is illustrated in the well-known case of *Williams v. Hedley*, 8 East, 378, which was an action for money had and received, brought to recover the sum of £965, as having been unduly obtained by the defendant from the plaintiff, under an agreement to com-

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promise a *qui tam* action for penalties of usury, brought by the defendant against the plaintiff. There the plaintiff's action was sustained, although the rule is recognized as applying when "the act is in itself immoral or a violation of the general laws of public policy."

A later case in this country exactly in point is that of *Inhabitants of Lowell v. Boston and Lowell R. R. Corporation*, 23 Pick. 24 (34 Am. Dec. 33), a leading authority in Massachusetts, on the doctrine of *pari delicto*, in connection with actions like the present. In that case, from the similarity of the grounds of defense to those in this, the court passes upon most of the questions raised here. The declaration sets forth in substance, that the plaintiffs were bound to keep in repair a certain highway; that the defendants while having the right to use that highway, for the purpose of removing stone and rubbish from the deep-cut, made for the passage of their railroad, removing certain barriers which had been placed across the highway, to protect travellers from falling into the deep-cut, and neglected to replace the same; that in consequence thereof, two persons named Currier and Smith, while driving along such highway, were precipitated in the deep-cut and greatly injured; and that by reason thereof, those persons brought their actions, and recovered large sums of money against the plaintiffs, which plaintiffs were compelled to pay, together with witness fees, counsel fees and other expenses attending the defense of such actions, amounting in the whole to more than \$8,000. The court expressly overrules the defense of *pari delicto* there taken, and sustains the city's right of action over against the railroad company. In the course of its opinion, the court announces: "The general rule of law is, that where two parties participate in the commission of a criminal act, and one party suffers damage thereby, he is not entitled to indemnity or contribution from the other party. * * * The rule is *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible for damages incurred by their joint offense. In respect to offenses in which is involved any more delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-

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doers." And after reviewing a number of authorities in which this application of the doctrine is adopted, the opinion proceeds: "This distinction is manifest in the case under consideration. The defendant's agent who had the superintendence of the works, was the first and principal wrong-doer. It was his duty to see to it, that the barriers were put up when the works were left at night; his omission to do it was gross negligence, and for this the defendants were clearly responsible to the parties injured. In this negligence of the defendant's agent, the plaintiffs had no participation. Their subsequent negligence was rather constructive and actual. * * * If the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot be controverted therefore that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability, and the policy of the law does not in the present instance interfere with the claim of justice. The circumstances of this case distinguish it from those cases where both parties are in *pari delicto*, and one of them having paid the whole damages, sues the other for contribution."

A common instance in which a party by operation of law is treated as wrong-doer, and held primarily responsible to the injured party, although not the actual trespasser, is that of towns or cities whose streets are rendered dangerous by railway corporations in constructing their roads, or by their own citizens in the course of erecting buildings or making other improvements. While the decisions are uniform that public necessity, and the nature of their obligations, require that municipal corporations should be held liable for the safety of their thoroughfares, the doctrine of *pari delicto*, though frequently invoked against them, has never been applied, because of their constructive default when they have sought reimbursement from the actual authors of the trespass or nuisance which has caused them to be sued. From among numerous cases to this effect we may cite as explicitly in point, the cases in 2 Black, 4 Wall. and 23 Pick., already quoted, and those of *Portland v. Richardson*, 54 Me. 46; *Portland v. Atlantic and St. Lawrence R. R. Co.*, 66 id. 486; *Boston v. Worthington*, 10 Gray, 496; *Milford v. Holbrook*, 9 Allen. 17.

In the case in *Gray* the city recovered the amount of a judgment paid by it, because of injuries received in consequence of the

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proprietor of a cellar-way having neglected to protect it by a railing, as required by an ordinance of the city, although the ordinance had been disregarded for twenty years. And in the case in *Allen* it was expressly ruled that the town of Milford in a similar action could not be deemed in *pari delicto* with one of its inhabitants, who had allowed his awning to fall through neglect and injure a passer-by. HOAR, J., remarking in the delivery of the opinion, "the only fault or negligence which could be imputed to the town on the facts shown was a failure to remedy a nuisance which the defendant had caused. This is no bar to their claim for indemnity."

The case now before us comes directly within the scope of these decisions. The appellee, under the evidence in this cause, cannot be charged with more than a constructive default. It is not even in proof that the defect in the bridge was known to the commissioners, or that it was plainly obvious or of long standing. The defense of *pari delicto* is clearly not applicable in this case.

We deem it pertinent here to observe, from the course of the argument, that had the commissioners known of the defect in the bridge, and the canal company, after demand, had failed to repair it, the former would have had the right to do so, and to resort to the company for indemnity for the necessary outlay. And it is proper that we should say further, that the party injured could have sued the canal company, instead of the present appellee, if he had elected so to do. The remedy against the commissioners is cumulative; and it is well settled that a party injured may, if he see fit, proceed directly against the party actually guilty of the *tort*, and against whom an action over for indemnity will lie.

In proceeding to consider how far the company was concluded by the judgment obtained by Eyler against the commissioners, it is proper to dispose of the objection made to the sufficiency of the notice to the appellant of the pendency of the suit in which it was recovered.

The authorities clearly establish most of those already cited going to that point, that the form of the notification to a party whose default has caused the institution of the suit, and from whom it is intended to seek indemnity, to appear in and defend the same, is not material. It is sufficient if he is substantially apprised of the nature of the proceeding, and is afforded opportunity to make his defense.

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The proof shows that the president of the canal company was distinctly notified, both verbally and in writing of Eyler's suit, and that the appellant, through two of its directors and its standing counsel, appeared and took part in the management of the case, the authority of the latter being distinctly recognized by the company's compensating him for his professional attention.

In the light of these facts it is unnecessary to define what kind of notice would have been required to bind the appellant, had it failed to attend the trial, or in that event to what extent it would have been concluded by the judgment. The fact being that the company did actually participate in the trial, and became in effect a party to the suit, and made as full defense, both on the law and the merits as if the action had been brought directly against itself, we consider that it is bound by the judgment that was rendered.

In this view we are supported by the expressions of the Supreme Court in 4 Wall. 672, in passing upon the same legal question. They say: "Conclusive effect of judgments, respecting the same cause of action and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause, but all who are interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights are equally concluded by them. See also 3 Wall. 18; 2 Black, 418; 2 Taylor on Ev., § 497; 1 Greenl. on Ev. (12 ed.) 559.

The only remaining question presented in the record, not disposed of in the views above expressed, is whether the appellant can be held liable for the amount of the counsel fee incurred by the commissioners in defending the suit. As no point was made as to the reasonableness of the fee for the duties performed, and no objection was urged at the time to the employment of the counsel, whose services in fact inured to the benefit of the company, the simple inquiry presented is, whether in conducting a defense made necessary by the default of another who is answerable over, the services of an attorney are a natural and proper incident or consequence to

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such a proceeding. We cannot regard them in any other light. Practically the ordinary citizen is incompetent to conduct the trial of his case. Only such as are learned in the law can intelligently do this for him, and without their assistance he would be at a great and unfair disadvantage. The law itself regards attorneys as an essential aid in the administration of justice, and recognizes them as officers of the court, with peculiar obligations as such, in order that suitors may have the full benefit of their acquirements, skill and training in the management of their causes. To be compelled to go to a trial, either without the assistance of counsel, or to bear the expense of employing one himself, would be a gross hardship upon a defendant who is sued upon a constructive liability, because of the actual default of another for whose benefit the defense is really conducted, and to whom the law declares it is equitable he should have recourse for indemnity.

In this view we are supported by the decision in a late case, *Inhabitants of Westfield v. Mayo*, 122 Mass. 100; s. c., 23 Am. Rep. 292, where the question of the allowance for counsel fees in a similar case was distinctly presented, with a copious citation of authorities and full argument. It was an action of *tort* to recover the amount of a judgment paid by the plaintiff to Mary J. Hanchett for injuries sustained by her upon a highway, which the plaintiff was bound to keep in repair, through the negligence of the owner of a pile of bricks, and also \$150, the expenses of the suit in which the judgment was recovered. The court expresses its conclusion in these words: "If a party is obliged to defend against the act of another against whom he has an action over, and defends solely and exclusively the act of another, and is compelled to defend no misfeasance of his own he may notify such party of the pendency of the suit, and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of the damages recovered, but for all reasonable and necessary expenses incurred in such defense. * * * In the present case the plaintiff was not compelled to incur the counsel fees by reason of any misfeasance, or of any contract of his own, but was made immediately liable by reason of the wrong-doing of the defendant. There seems therefore to be no ground in principle by which it should be precluded from recovering the expenses reasonably and properly incurred in consequence of the wrong-doing of the defendant."

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If the point had been expressly presented, and clearly set out and supported in the evidence, that part of the amount sued for outside of the judgment for damages, consisted of specific items of costs and expenses incurred in the first case, and that the defense was there conducted solely in behalf of the appellee without the knowledge of or opportunity to participate therein by the appellant, objection to the judgment appealed from to the extent of such items would have been valid. But we may fairly infer from the testimony of the witness, Mr. Cox, as it is set out in the record, that the company was made aware of the first trial; and so far as the statement accompanying the verdict of the jury informs us, we are not advised that any costs were computed by them, but those incurred after the case was remanded from the Court of Appeals. In the absence of proof to rebut these presumptions the verdict and judgment are entitled to all intendments in their favor.

It follows from the conclusions we have announced that the judgment below must be affirmed.

Judgment affirmed.

 CARLIN V. WESTERN ASSURANCE COMPANY OF TORONTO,
CANADA.

(57 Md. 515.)

Insurance — fire — “manufacturing establishment” — lights — “premises” — petroleum for lubrication.

A steam flour mill is a “manufacturing establishment.” (*See note, p. 446.*)

A fire insurance policy prohibited the use of camphene, spirit gas, burning fluid or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps filled by daylight. The insured used for lights lard oil and candles, filling the lamps at night. *Held*, no breach of condition.

A fire insurance policy on a specifically described steam flour mill and machinery prohibited the keeping of petroleum on “the premises.” The insured kept a barrel of petroleum in the engine house adjoining, but not included in the specific description of the premises. The fire originated in the main building. *Held*, that the petroleum was not on “the premises,” and that the insured had a right to keep petroleum on the premises for the purpose of lubricating the insured machinery.

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ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

George Hawkins Williams, for appellant.

Wm. H. Bruce, Jr., and *John M. Carter*, for appellee.

RITCHIE, J. The policy of assurance, upon which the appellant, as plaintiff below, seeks to recover, was issued to him by J. S. Metzger, agent of the company. It describes the property of plaintiff insured as "his steam flour mill, fixtures or machinery, viz. : middling purifier, belting and machinery to run the same [and other specified articles], all contained in a two story frame, shingle roof building with stone basement, situate well detached in Frostburg, Md." There are sundry provisions in the policy, the violation of which works a forfeiture of the insurance.

The particular conditions for the alleged violation or non-observance of which the defendant claims to be discharged from liability are, first, those relating to precautions against fire, which are as follows : "If it [the premises mentioned] be a manufacturing establishment, running in whole or in part over, or extra time, or running at night ; * * * or if in said premises there be kept gun-powder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine or benzine varnish, or there be kept or used therein camphene, spirit-gas or any burning fluid, or any chemical oils, without written permission in this policy (excepting the use of refined coal oil, kerosene, or other carbon oil for lights, if the same is drawn, and the lamps filled by daylight), then, and in every such case, this policy shall become void."

[Omitting a minor statement.]

The proof shows that outside and standing against the building described as that containing the machinery insured, was a small structure in which were placed the engine and boiler which supplied the power for running the mill. The structure was but one story, of the height of the stone basement of the other, and having a shed roof. The engine and boiler were not included in the machinery covered by the policy, nor any articles contained in the engine house.

About midnight of the 13th of June, 1878, both buildings, with

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all their contents, were destroyed by fire. The cause of this fire, which originated in the main building, on the side opposite from the engine-room, is unknown.

The evidence further shows, that the mill in which the machinery was located was sometimes run at night between the dates of issuing the policy and the fire, but not the night on which the fire took place; that when the mill was run at night the plaintiff used for lights lard oil and candles, the oil so used being of the kind used by the miners in the Cumberland coal region, the plaintiff filling his lamps at night as occasion required, when the mill was run at night; that the plaintiff used petroleum, which from the testimony is a natural lubricating oil, for the purpose of oiling the machinery of the mill, which he bought in quantities not exceeding one barrel at a time, and that said oil was kept in such barrel in said engine-room.

[Omitting a minor consideration.]

The right of the plaintiff to run his mill at night depends upon whether the mill was a "manufacturing establishment;" and unless what the policy meant in using this term was the subsequent conversion of the premises into a manufacturing establishment other than or of different character from what it then was—and the appellant seems to have made no such point—this was simply a question of fact to be left to the jury, and it was properly submitted in defendant's fifth prayer. But what is to be deemed a manufacturing establishment; or in other words, what is the signification of the verb to manufacture, is for the court to define. The counsel for appellant contended that making flour from wheat, reasoning from the etymology of the word, and the nature of the process, is not manufacturing. But whilst, from its derivation, the primary meaning of the word "manufacture" is making with the hand, this definition is too narrow for its present use. Its meaning has expanded as workmanship and art have advanced; so that now nearly all artificial products of human industry, nearly all such material as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, which after all is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages, are now commonly designated as "manufactured."

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Burrill defines "to manufacture," "the process of making a thing by art," and cites, BUTLER, J., in 2 H. Bl. 463, 471. Abbott gives it meaning as "whatever is made by human labor, either directly or through the instrumentality of machinery." The definition in Webster is, "To make or fabricate from raw materials by the hand, by art or machinery, and work in forms convenient for use." Worcester has in substance the same definition. A case directly applicable is that of *Schriefer v. Wood*, 5 Blatchf. 215, in which animal charcoal, produced by the process of burning bone, in the same manner that wood is exposed to the action of fire, to produce common charcoal, and bone-dust produced by pulverizing or grinding bones, are decided to be "manufactures of bone." The question here considered was involved in that case, and the decision accords with the view we have expressed. We think therefore that plaintiff's flour mill, driven as it was by steam, and furnished with a middling purifier, bran-duster, belting and other machinery, was clearly a "manufacturing establishment."

[Minor consideration omitted.]

In our view none of the lights used in the mill come within the specification of articles forbidden for that purpose by the policy; and consequently it is immaterial whether the lamps were filled by daylight or not. On this point, the prohibition is in these words: "or there be kept or used therein camphene, spirit-gas or any burning fluid or any chemical oils, without written permission in this policy, (except the use of refined coal oil, kerosene or other carbon oil for lights, if the same is drawn, and the lamps filled by daylight) then, and in every such case, this policy shall become void." The defendant's construction of this condition is, that the use of any kind of material for illumination but those enumerated in the qualifying or excepting cause recited, is a violation of the policy. We do not so understand it. After forbidding the keeping on the premises of gunpowder, nitro-glycerine, petroleum and other similar articles of an explosive or highly combustible character, the prohibition proceeds, as stated above, to enumerate other articles, used for illuminating purposes, equally known to be especially dangerous, because highly inflammable and explosive, following however with the reservation, that certain other kindred articles, also recognized as dangerous, but of a somewhat lower degree of inflammability, may be used, provided the filling of the lamps is done in the day-time. This is evidently a mere relaxation

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of the stringent precaution, or a privilege for the employment of certain hazardous substances, conceded on the score of convenience or practical necessity, and not intended as a restriction to their use alone to the exclusion of such others as are manifestly safer. The danger sought to be averted is of setting fire to the premises; and the use of articles free from the dangerous properties of those permitted, and therefore less objectionable, is not within the reason of the prohibition. The filling of the lamps by daylight is required evidently to guard against the ignition to which the substances specified are liable, from their volatile nature, on contact with or nearness to the light necessary to be used after nightfall, in drawing them and pouring them into the lamp. To this category plainly belongs "burning fluid," one of the substances named; and which is not from the context, or the reason involved, as well as from its nature as popularly and commercially known, to be taken to embrace any and all fluids that may be made to burn, without reference to the appliances necessary to cause them to give light or their inherent liability to take fire. In no proper sense therefore do we consider that the use of candles, or such oil as the plaintiff filled his lamps with, is within the contemplation of the clause in question. As this conclusion is at variance with the propositions presented in defendant's prayers, there was error in granting them.

The defendant's second prayer must also be pronounced erroneous, because as we construe the term — "the premises where the insured property was situated, " the barrel containing the petroleum used for lubricating purposes, was not kept therein. The defendant assumes that the small house or engine-room, in which the barrel was placed, is included within the meaning of the words "said premises," employed in the policy. Although in a general sense the engine-room was undoubtedly part of the milling establishment, it is not embraced in the description of the property with reference to which the words "said premises" are used. The insurance was not affected upon the buildings at all, but upon certain portable machinery. In describing what machinery is the subject of the risk, reference is made to the building which contained it, merely for its more certain identification. This building, which was the larger one, is incidentally but accurately described for this purpose. No part of the description of this building is applicable to the dimensions or appearance of the engine-room. And the latter is of necessity excluded; because the object being only to

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describe the building in which the machinery insured was contained, and none of this machinery being in the engine-room, there was no reason why the engine-room should be described, but a very obvious one why it should not. The building therefore that was described antecedently to the use of the words "said premises," is the only one to which they can be taken to relate.

But even had it appeared from the policy that the engine-room was included in the description of the premises, the keeping of the petroleum therein, under the circumstances shown, although it is among the list of articles forbidden to be kept, would not in our opinion have vitiated the policy, if evidence were introduced showing that it was the appropriate and customary article used in the plaintiff's trade for lubricating machinery, and that he had kept it on the premises for that purpose only, and in a reasonable and prudent manner and quantity. As the defendant knew when it issued the policy, that it was insuring machinery that was part of and essential to the equipment of defendant's steam flour mill, and that such a mill could not be operated except by machinery, it must be supposed to have contracted with reference to what was a necessary and ordinary incident to the running of such machinery. An indispensable requisite to machinery in motion is its lubrication; and the necessity for having at hand such material as is shown by the common experience of those in the business to be adapted to that purpose must be presumed to have been contemplated by the contracting parties. If that material, in running a steam flour mill, is petroleum, it cannot be supposed that the prohibition against keeping petroleum extended to the necessary and proper use of it as a lubricating oil, but applied only to its being kept in the sense of storing it, or for commercial traffic, or at least in some way other than its use in a careful manner for the purpose of lubrication. Where the contrary is not expressly made to appear it is not to be presumed that when an insurance is effected with reference to an established and current business, whose protection is really the object of the insurance, such a narrow and stringent construction of the provisions of the policy was intended as will necessarily cause its serious embarrassment or suspension.

That this is the correct rule in construing policies of insurance, such as was issued to the plaintiff, we consider well settled. Among the authorities in its support we refer to the following cases as peculiarly applicable, because growing out of alleged for-

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feitures of insurance in connection with inflammable substances identical with those pertaining to this controversy: *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. 194; *Bryant v. Poughkeepsie Mutual Ins. Co.*, id. 200; *Citizen's Ins. Co. v. McLaughlin*, 53 Penn. St. 485; *Williams v. Firemen's Fund Ins. Co.*, 54 N. Y. 569; s. c., 13 Am Rep. 620. See also *Whiteford's* case, 31 Md. 219.

It follows from the conclusions at which we have arrived that not only should the second, third and fourth prayers of the defendant have been rejected, but the third prayer of the plaintiff should have been granted; and that the judgment of the Circuit Court must be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

NOTE BY THE REPORTER. — The words manufactory, manufacture, manufacturer, have received construction in several recent cases. These have been grouped in a forthcoming work by the reporter, entitled, "The Judicial Interpretation of Common Words and Phrases," from which we extract the following:

An ice-cream confectioner is not a "manufacturer." *City of New Orleans v. Henderson*, 32 La. Ann. 1075. The court said: "We cannot assent to the proposition that a person making and selling ice-cream is a manufacturer in the sense of the law, or in any other sense of the word. The attempt to magnify a confectionery, which is defendant's business into a manufacture, must fail. We are told that any one seeing the steam engine, complicated apparatus, and large force needed to produce defendant's goods, would at once conclude that he is a manufacturer. With as much force it might be said that any one visiting the mammoth kitchen of the Grand Union Hotel at Saratoga, together with their myriads of employees, and their colossal apparatus, would at once magnify the cooks and pastrymen into manufacturers."

At the Rensselaer (N. Y.) Sessions, many years ago, in *People v. Bradt*, it was held that a flax-mill is not a "manufactory" within the statute of arson, it being only a place where the flax is separated from the husk."

A publisher of a newspaper is a "manufacturer," within the bankrupt act. In *re Kenyon*, 6 Bankr. Reg. 238. But the contrary was held in *Re Capital Publishing Company*, 3 McArthur, 405. The court said: "There can be no doubt that the word 'manufacturer' was used in the statute in the limited sense in which it is commonly understood. The agriculturist is engaged in the most extensive industry of this or any other country, and he brings to the market many commodities which are produced without the direct aid of the soil, or of the vegetative powers of nature, but he is never spoken of in common parlance as a manufacturer. The industries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art, or machinery, into commodities for use; and the examples given are cloths, iron shoes, cabinet-work, glass, cotton and silk goods, etc. This limitation of the term manufacturer is to be adopted as the true meaning of the bankrupt law. Perhaps there is no substantial difference between the various branches of industry in any respect, except only in regard to the different processes which they employ. To manufacture is to change and modify natural substances so that they become articles of value and use. Chantrey was in the habit of receiving \$3,000 for a single bust, Bierstadt \$25,000 for a single picture, and the representation of Lincoln's Cabinet was purchased at a cost of \$20,000, and presented by a noble-hearted American lady to the Congress of the United States. These are called works of art, but in a legitimate sense they may be comprised among the productions of manufacturing industry. The artists use material and natural substances. They oftentimes employ a variety of subordinates. They work with their hands, and perfect an article of great pecuniary value. It symbolizes their art and genius. In a

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word, the artist accomplishes all that is implied by, but he is never included in, the term manufacturer. The definitions and rules which obtain in the patent office are not applicable here. A newspaper is not regarded as a manufacture any more than a painting, and an editor a manufacturer as little as an artist. We have been referred to the case *In re Kenyon*, decided by the Supreme Court of Utah. It was a case where the bankrupts carried on the business of printing blank books, cards and bill-heads, in addition to which they published a daily paper, and the petition alleged that they published the newspaper and 'are manufacturers of books, cards, bill-heads,' etc. And the court say: 'Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have expressed the opinion that it would be, and I am inclined to the same conviction.' It will be observed that the decision is placed upon the ground of bankrupts being manufacturers of books, bill-heads, etc.; and in this respect they were undoubtedly within the meaning of the act. Having come to this conclusion, the court further say that it is not necessary to decide that the publishing of a newspaper is manufacturing within the strict sense of the law, but express the opinion 'that it would be.' No more weight can be given to this voluntary case than to any other conditional *obiter dictum*. It might be respectfully suggested that the substantial difference between the strict sense of the term 'manufacturer,' in the abstract, and the strict sense it is to receive in the law, has been overlooked in this decision. We have already stated the proposition that every branch of industry which converts any material or substance into useful commodities, strictly speaking, comes under the term 'manufactures,' and in that sense a newspaper or a painting would be included. But we are of opinion that this is not the strict sense of the statute, which only includes those industries which commonly pass under that designation. This is an important distinction; for while all employments rest upon the same faculty in man to labor, to contrive, and to mould the refractory elements of matter, common usage and the convenience of society have given a limited signification to the word. The rule already adverted to for the interpretation of statute law limits its import to the sense in which it is usually received. Now, no definition of the word 'manufacturer' has ever included the publisher of a weekly newspaper, and the common understanding of mankind excludes it. You may reason by analogy, or reason from the nature of things, that it is; and so you may do the same thing with anybody who labors himself or employs others. But surely a bankrupt law is not to be expanded to cover every employment. It was by express terms limited to certain classes, who are designated by names well known in the business world. The husbandman prepares the soil; the inventor his models; the orator his address, for which he receives \$300 a night; the lawyer makes his brief, for which he scarcely ever gets enough; the physician formulates his prescription; and so on through all the divisions of labor and industry. By these means man acquires a certain mastery and is furnished with inestimable results. So of the newspaper. It has grown within a century into the most popular vehicle for the spread of information. Its vigor and influence are felt in every household. Indeed it may be called the people's storehouse of intelligence. It claims to be an institution, and even our statesmen, with great complacency have denominated it 'the fourth estate.' It does not come within the popular meaning of the term 'manufacture,' unless indeed, when its contents are slenderly endowed with the truth, or when its articles appear to be made out of whole cloth. It gives employment to printing-presses and types and editors; and yet in the whole history of newspapers, from the close of the seventeenth century, this word 'manufacturer' has never been applied to them, or appropriated by them, in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or by any authority, except by way of opinion in the solitary case from Utah."

In *Frazee v. Moffitt*, United States Circuit Court, Southern District of New York, it was held that pressed and baled hay is not a "manufactured article." BLATCHFORD, J., said: "Many articles are properly called raw which have undergone some manipulation. Cotton is picked from the bolls, and cleaned by ginning and baled. Yet it is raw cotton in the bale. Wheat is cut and the grains are threshed out and then subjected to a cleaning machine and then bagged. Yet it is raw wheat in the bag. So with other grains. The cotton and the grains undergo such change and preparation as exposure to light and natural or artificial heat and air, and the manipulation they receive, produce or allow, be

it more or less. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grains are the same articles they were when on the plant with its roots in the earth. So hay is the same article it was when it was stalks of grass with roots in the earth. It is dried, to be sure, but the drying and any conversion of starch into sugar are mere incidents of the necessary cutting to enable it to be stored for food in latitudes where grass cannot be found all the year round. Where it can be so found no hay is stored. Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture."

GOODE V. MARTIN.

(57 Md. 606.)

Animals — negligence — notice of viciousness — agency.

The defendant was accustomed personally to tie his watch dogs by day and loose them at night. Having overslept one morning and neglected to tie the dogs they bit the plaintiff, who came lawfully on the premises by the invitation of the defendant's daughter. *Held*, that the defendant's knowledge of the dangerous character of the dogs might be inferred from his habit of tying them by day; but not from his wife's asking the daughter why she had not tied them.

ACTION of damages for personal injury by bite of dogs. The opinion states the facts. The defendant had judgment below.

A. W. Perrie and John J. Yellott, for appellant.

J. F. C. Talbott and William Grason, for appellee.

GRASON, J. At the trial of this case in the court below, an instruction was granted, at the instance of the defendant, that there was no evidence legally sufficient to entitle the plaintiff to recover; and the verdict and judgment being in favor of the defendant, the plaintiff appealed, and the only question presented for our consideration is, whether there was any evidence offered by the plaintiff legally sufficient to be left to the determination of the jury.

The suit was instituted to recover from the defendant, damages for the loss of the services of the plaintiff's son, who had been bitten by the defendant's dogs, and for medical attendance and medicines which were rendered necessary by the son's injuries. It

was proved that the defendant, who lived in a thickly settled neighborhood, and was a blacksmith, kept two dogs, a large New Foundland and a small terrier, for the protection of his property, and that he kept them tied during the day, and turned them loose in his yard at night. It was also proved that the defendant sold milk to some of his neighbors, when he had more than sufficient for the use of his family, and among others to the plaintiff, who was in the habit of sending for it by his son, who was about twelve years of age, and sometimes by his daughter, who was still younger, and that on the Sunday morning, when the boy was bitten, he was sent for the milk, and found defendant's gate fastened so that he could not open it, and that he shook and rattled the gate, in order to attract the attention of some of the defendant's family, and that this caused the dogs to bark at him. Becoming alarmed he turned to leave the place, when the defendant's daughter made her appearance, and called him back, and told him that she would not let the dogs bite him. She then put the dogs in the blacksmith shop, opened the gate and the boy entered the premises, and went with her upon the porch of the dwelling where she left him, while she entered the house to get him the milk. While he was awaiting her return, the dogs came from the shop and upon the porch, and the large dog began to growl and jump at him. He became frightened and started to leave the porch, when the dogs attacked him, and both bit him, making wounds upon his hand, arm and hip. The defendant's daughter came out and took the dogs off, and the boy took refuge in defendant's kitchen. The defendant and his wife, hearing the noise, came down undressed, and the wife asked her daughter why the dogs had not been tied, and directed her to tie them.

The defendant said that he tied the dogs every morning, but that he had remained later in bed that morning, and therefore had not tied them as early as usual. David Price proved that he had worked for defendant two months in the spring of 1880, and that defendant had two dogs, which he kept tied during the day, but that he did not know what he did with them at night, as witness was not there at night, nor did he know for what reason they were so kept tied. He also proved that when he first went to defendant's to work, if he went into that part of the yard where the dogs were tied, and made any "fumbling," the dog would bark and run at him the length of his chain, until he got acquainted with him, which was a month or more

after he went there, and that the dog was rather fierce. The plaintiff testified to substantially the same facts as had been proved by his wife; that his son was bitten on the finger, arm and hip, and was considerably bruised, and his clothes much torn, and that the doctor had been to see him four times, and that medicines had been procured, but that the loss of his son's services was nothing. There was no proof tending to show that the dogs had ever bitten any one before, or that the defendant had any knowledge that his dogs had been accustomed to attack or bite, or that they had made any attempt to get at the witness Price, in the manner testified to by him.

In order to render the owner liable in damages to any one bitten by his dog, it must be proved not only that the dog was fierce, but that his owner had knowledge that he was fierce. To this effect are all the authorities. See *Card v. Case*, 57 Eng. C. L. 622; *Hogan v. Sharpe*, 32 id. 720; *Beck v. Dyson*, 4 Camp. 198; *Morgan v. Thomas*, 2 Crompt. Mees. & Roscoe, 388; *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, Moody & Malkin, 505. And to the same effect are the cases cited in the appellant's brief, and he admits the law so to be. But he contends that the question asked by defendant's wife of her daughter "why she had not tied the dogs," and her direction to her to tie them, was evidence the wife knew that the dogs were fierce, and that her knowledge of that fact ought to be imputed to her husband. He also contends that as the defendant's daughter invited the plaintiff's son into the yard, and told him that she would not let the dogs bite him; drove them into the shop and had charge of the milk department; was the daughter and servant of the defendant, and had charge of the dogs and knew that they were fierce, her knowledge also was the knowledge of her father and employer. It is true that in the case of *Baldwin v. Casella*, 26 L. T. (N. S.) 707, it was held that where a servant knew that a dog was fierce and accustomed to bite, that the knowledge of the servant was to be imputed to the master and owner of the dog; but it was so held solely because the dog was committed to the care and management of the servant, who was the coachman and kept the dog at the stables.* In this case there is no proof whatever that any one had the care and management of

* In *Corliss v. Smith*, 53 Vt. 532, held, that when one employs an agent to control his farm and the property thereon, the agent's knowledge of the vicious habits of a dog owned and kept by the principal on the farm is the knowledge of the principal.—*REP.*

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the defendant's dogs other than himself, as he swears that he tied them every morning and assigns as a reason why he had not tied them the morning the boy was bitten, that he had remained in bed longer than usual. Neither is there any proof that defendant's daughter had charge of the milk business; the proof only showing that on the morning in question she had volunteered to get the milk for the boy and to keep the dogs from biting him, she being then the only member of defendant's family who was down stairs. The proof does not show that the daughter was either the servant or agent of the defendant in the respects contended for by the appellant's counsel.

Nor is there any evidence to prove that defendant's wife had any knowledge that the dogs were fierce and vicious, further than what may be inferred from what she said to her daughter, after finding that the dogs had attacked and bitten the boy. She may have very naturally asked her daughter why she had not tied the dogs, and given her directions to tie them, without having had any previous knowledge that they would bite. But even if she had had such knowledge, her knowledge could not be imputed to the defendant. In the case of *Gladman v. Johnson*, 15 L. T. N. S. 476, it was held that where a wife assisted her husband in his milk business, and a customer had been bitten and had informed her of the fact and requested her to inform her husband, it must be presumed that she had given the information as requested, and that he therefore had knowledge that his dog was accustomed to bite. But the case before us is very different from that. Here we are asked to presume that the wife had knowledge of the fact, and then further to presume that she had communicated such knowledge to her husband; thus raising one presumption upon another. For this no authority has been or can be furnished.

But we think the appellant is right in his contention that the defendant may be presumed to have had a knowledge that his dogs were fierce and dangerous, from the fact that he was accustomed to keep them tied during the day-time. In *Jones v. Perry*, 2 Esp. 482, Lord KENYON held that from the fact that the owner kept his dog tied and did not permit him to run at large, it must be presumed that he had knowledge that the dog was vicious, unruly and not safe to be permitted to go abroad. And in *Buckley v. Leonard*, 4 Denio, 501, it was held that the fact that the owner usually in the day-time kept his dog confined, and in the night kept him in

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his store, was evidence that he was fully aware that the safety of his neighbors would be endangered by allowing him to be at large. So, in the case now before us, we think that the fact that the appellee kept his dogs tied during the day and let them loose at night, furnishes proof that he knew it would endanger his neighbors to permit them to be unfastened. His statement that the dogs had not been chained at an earlier hour, on the day the boy was bitten, because he, the appellee, had remained in bed later that day than usual, is also proof tending to show that he knew that it was unsafe to permit them to be unchained at a time when it was likely that persons would be visiting his house ; and he also knew that this very boy was in the habit of coming to his house about that time of the day for the purpose of obtaining milk. This evidence ought to have been left to the jury as tending to prove the temper and vicious disposition of the dogs, and the knowledge of the appellee thereof, and it was therefore error in the judge of the Circuit Court to take the case from the jury, and the judgment appealed from will be reversed and a new trial awarded.

Judgment reversed, and new trial ordered.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

MARQUETTE, ETC., RAILROAD COMPANY V. KIRKWOOD.

(45 Mich. 51.)

Carrier — successive — presumption as to liability.

Where one of a continuous line of carriers is sued for injury to goods entrusted to him for carriage, there is no presumption that he received them in good order, but the fact must be affirmatively proved by the plaintiff. (*See note, p. 457.*)

ACTION against a common carrier for injury to goods carried. The opinion states the facts. The plaintiff had judgment below.

W. P. Healy, for plaintiffs in error.

E. J. Mapes, for defendants in error.

CAMPBELL, J. Defendants in error sued plaintiffs in error and recovered damages for breakage of two marble soda fountains taken by the railroad agents at Marquette, and carried, one to Negaunee and one to Ishpeming. The fountains were packed in New York

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and forwarded by the New York Central Railroad, and by that company, as is claimed, turned over at Buffalo to the Lake Superior Transit Company, which is a connecting line. The Transit Company delivered the property at Marquette to the plaintiff in error, with which it had no business arrangements but which was the proper carrier from Marquette to the destination of the articles. The boxes, which were marked to be handled with care, were then apparently sound except that a handle of one consisting of a strip of board was injured. Each box when opened at its destination was found to contain a fountain of which some of the marble was broken.

The testimony for plaintiffs as well as that for defendants indicates that there was no appearance in either package which would indicate damages at any time except the broken handle. There was no evidence of neglect on the part of the railroad company and there was affirmative evidence to the contrary. It was conceded that the railroad company had no means of inspecting the property. Under these circumstances the Circuit Court told the jury that if the goods were delivered in New York in good order to the first carrier they would have a right to infer that they continued so when received by defendants below, unless evidence was given which showed the contrary.

[A minor consideration omitted.]

Upon the other question we think that the ruling was also wrong. The case comes directly within the principle laid down by this court in *M. H. & O. R. R. v. Langton*, 32 Mich. 251, where it was sought to hold these same parties responsible for delivering hay in a damaged condition, by showing that it was in good condition when delivered to a previous carrier at Sheboygan. In that case as in this the court below held that such a showing shifted the burden of proof upon the railroad company, and we held that this was error, and that the plaintiff was bound to show affirmatively that the hay was delivered in good order at Marquette to the railroad.

We think this rule is just, and are not at all disposed to depart from it. A carrier has no means in a case like this of opening packages and examining their contents. Unless there is some outward token which is suspicious, he may and must take the articles and forward them on the usual terms. He is bound in law to deliver them in the condition in which he receives them. But there

can be no further responsibility ; and any rule of law which would make him responsible actually or presumptively for the conduct of previous independent carriers, would be grossly unfair, and subject him to losses against which he could have no protection. He has nothing to do with any of the previous dealings with the property, and no means of informing himself about them. We cannot see how this case is different from what it would have been if the plaintiffs themselves had delivered the boxes to the company at Marquette. In law the Transit Company acted merely as plaintiffs' agent in turning them over, and cannot be treated as representing the Marquette Railroad Company for any purpose without reversing the whole order of business. *Fitch v. Newberry*, 1 Doug. Mich. 1.

In view of our previous decision we should not feel justified in going into this question at all, if it did not seem to be imagined that if the case of *Laughlin v. Railway*, 28 Wis. 204 ; s. c., 9 Am. Rep. 493, had been fully called to our attention, it might have changed our views. The other cases cited on the argument, except one from North Carolina following it, do not have any particular bearing. In that case the court treating it as a question not directly covered by previous precedents, held that it would be more convenient and less onerous to the owners of goods to adopt such a rule as is contended for by the plaintiffs below. The only ground discovered for it was the presumption that things remain as they once have been shown to exist. The cases cited as resting on that presumption were not at all in point except by some assumed analogy.

We certainly have the highest respect for the decisions of the court which so decided. But we cannot convince ourselves that the decision is well founded on legal analogies, or correct in principle.

The presumption that things remain unchanged applies in such a case as the present just as forcibly backward as forward. It may quite as reasonably be presumed that the goods were delivered at Negaunee and Ishpeming in the condition in which they were received at Marquette, as that they came to Marquette as they left New York. The goods were certainly damaged when they reached their destination. To assume that they were damaged after they left Marquette, and not on any of their previous removals, is to make a very arbitrary assumption which has no more foundation in probability than any other. If it were worth while to enlarge on

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what is confessedly a presumption not resting on any sure foundation in experience, it might very well be questioned whether such a presumption is admissible at all as applied to things the position of which does not remain either fixed in place or free from disturbance by human agencies. But we need not enlarge on this because the nature of the suit itself raises different presumptions which are well recognized.

This suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than the rule that any one who claims a right to damages for negligence must prove it. The presumption that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he received safely is independent of care or negligence. But in the absence of proof that there was property delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved.

In a somewhat similar case, *Muddle v. Stride*, 9 C. & P. 380, Lord DENMAN told the jury that if it were left in doubt what the cause of damage was, the defendants were entitled to their verdict, "because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as the other, then also the defendants will not be liable for negligence."

In *Gilbart v. Dale*, 5 Ad. & El. 543, the same rule was laid down, and it was held that there could be no recovery without proof, and that the presumption could not be raised without foundation. And in *Midland Railway v. Bromley*, 17 C. B. 372, the same principle was affirmed, and it was held that if the evidence was as consistent with the claim of one side as with that of the other, the plaintiff must fail, because he must make his proof preponderate.

There is no reason for presuming that the Marquette Railroad did the mischief, that would not arise with equal force, according to the Wisconsin decision, against either of the previous carriers, had they been sued instead. Had the first carrier been sued it

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would unquestionably have been bound to show a safe transit, because that carrier received the articles in actual good order. A presumption that has no better foundation, and that applies to one as readily as to another, ought not to prevail to raise a further presumption of negligence without proof.

The judgment must be reversed with costs and a new trial granted.

The other justices concurred.

NOTE BY THE REPORTER.— See *contra*, *Shriver v. Sioux City & St. Paul R. Co.*, 38 Minn. 506; s. c., 81 Am. Rep. 363.

Smith v. N. Y. Cent. R. Co., 48 Barb. 235, affirmed 41 N. Y. 630, is the earliest decision on the point, so far as we can learn. In this case the safety of the owner and the access to proof are made the foundations of what is conceded to be an exception to the general rule, that "the burden of proof is always upon the party who asserts the existence of any fact which infers legal responsibility."

The *Loughlin* case, cited in the principal case, was followed in *Dixon v. Richmond and Danville R. Co.*, 74 N. C. 538. The court said: "If the contents and condition are unknown, liability may be guarded against by a stipulation, or by an examination. It is important that these precautions should be observed, because by them the shipper will be able to know and prove on which line an injury has accrued, and only in this way can the shipper know unless he accompany the article all the way. And it is negligence in a receiving line not to take these precautions. And failing to take them the receiving line is presumed to have received the article in good order. If this were not so, then shippers would be at the mercy of the carriers."

The principal case seems unsupported by authority.

TAYLOR V. LAKE SHORE, ETC., RAILROAD COMPANY.

(45 Mich. 74.)

Negligence — action of, for private breach of municipal duty.

Where a city ordinance requires the citizens to keep their sidewalks free from ice, no action lies in favor of an individual against a citizen for an injury occasioned by his breach of that duty.*

ACTION of damages for personal injury by negligence. The opinion states the facts. The defendant had judgment below.

Griffin & Dickinson and *Henry M. Campbell*, for plaintiff in error.

* See *City of Hartford v. Tulcott*, ante, 189.

Taylor v. Lake Shore, etc., Railroad Company.

Ashley Pond, for defendant in error.

GOOLEY, J. The plaintiff sues the railroad company to recover compensation for an injury suffered by her in consequence of slipping and falling upon ice which had formed on a sidewalk in front of premises occupied by defendant in the city of Monroe, and which the defendant had failed to remove as required by law. It is not claimed that any such action would lie at the common law, and the right of recovery is supposed to arise from certain State and municipal legislation.

The State legislation in question is the general act for the incorporation of cities, passed in 1873, under which the city of Monroe is now organized. Chapter 23 of this act relates to the sidewalks. Section one gives the city council control of all sidewalks, with power to construct and maintain the same and charge the expense thereof upon the lots and premises adjacent to and abutting upon such walks. Section 2 empowers the council to require the owners and occupants of adjacent lots to construct and maintain sidewalks, and section 3 is as follows: "The council shall also have power to cause and require the owners and occupants of any lot or premises to remove all snow and ice from the sidewalks in front of or adjacent to such lot and premises, and to keep the same free from obstructions, encroachments, incumbrances, filth and other nuisances."

Section 4 provides that if any owner or occupant shall fail to perform any duty required by the council in respect to sidewalks, the council may cause the same to be performed, and levy a special assessment to meet the expense on the lot or premises adjacent to and abutting on the sidewalk.

Section 5 is as follows: "If any owner, occupant or person in charge of any lot or premises, shall neglect to repair any sidewalk in front of or adjacent to such premises, or to remove any snow or ice therefrom, or to keep the same free from obstructions and incumbrances, in accordance with the requirements of the ordinances and regulations of the council, he shall be liable to the city for the amount of all damages which shall be recovered against the city for any accident or injury occurring by reason of such neglect." General Laws, 1873, pp. 244, 325, 326.

Acting under the authority conferred by this act, the city council adopted an ordinance whereby it was provided that the

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owner or occupant of any house or building, or person entitled to the possession of any vacant lot, or person in charge of any church or other public building, or any street, alley or public space, shall not permit the sidewalk and gutter adjoining the same to be obstructed by snow, ice, filth, dirt or other incumbrance, and where ice is formed on any sidewalk and gutter, such owners, occupants, or persons having charge, or entitled to possession of property adjoining, as above provided, shall within twenty-four hours after the same has formed remove the same, or cause sand, sawdust or ashes to be strewn thereon.

The defendant, it is alleged, failed to remove within twenty-four hours, as required by this ordinance, the ice which had formed on the sidewalk in front of its premises, and the plaintiff sustained a severe injury by slipping and falling thereon.

It is said on behalf of the plaintiff that the obligation to keep the sidewalks free from snow and ice is imposed as a duty to all persons who may have occasion to use the walks in passing and repassing, and that the neglect to do so, in consequence of which any one lawfully using the walk is injured, is a neglect of duty to him, and entitles him on well recognized principles to maintain an action. *Couch v. Steel*, 3 El. & Bl. 402; *Aldrich v. Howard*, 7 R. I. 214.

To maintain this proposition it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of the city; for if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. *Atkinson v. Water Works Co.*, L. R., 6 Exch. 404.

The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. In this case the duty was to keep the sidewalks free from obstructions. It will not be claimed that this was not a duty to

the whole public of the city, and the disputed question is whether it is also a duty to each individual making use of the walks.

An obstruction by snow or ice may make the use of a walk dangerous, or may wholly preclude its use for the purpose for which walks are constructed. If the duty to keep the walk free from obstructions is a duty to individual travelers desiring to use it, it is as much broken when the walk is wholly obstructed as when it is capable of use but is dangerous, and an action will as much lie by one who is compelled to go around an obstruction, as by one who slips and falls in a dangerous place. Moreover as the lot owner is required to keep the walk free from all nuisances, an individual traveller who can maintain the proposition that this is a duty to him must be entitled to bring suit whenever the existence of a nuisance diminishes either the comfort or the safety of the use of the walk by him. This view of the obligation of the lot owner would add greatly to his common-law liabilities, and it is not easy to draw the line which should definitely limit and confine his liabilities.

But if we look a little further into the statute under which the city is incorporated, we shall see that all its provisions respecting sidewalks, so far as they impose duties upon the owners of adjoining or abutting lots, have one common object, namely : to provide suitable and safe passage-ways for foot passengers by the side of the public streets, and to keep these in condition for safe use. The expense of such ways is imposed on the owners of adjacent lots, and these owners must keep them free from encroachments. Will it be claimed that if the city council shall require a lot owner to construct a sidewalk in front of his premises, and he shall fail to obey the requirement, every person who should come upon the street desiring to pass on foot where the walk should be, and who shall be precluded from doing so by the walk not being constructed, may bring suit against the lot owner for the neglect to build it as a neglect of duty to the traveller himself? He is damnified in that case as clearly as when he falls upon a dangerous walk and is hurt; though the damage may perhaps be insignificant.

But it is clear, we think, that the duty to build the walk is only a public duty, and the duty to keep it in condition for use is also a public duty. Exactly what force is to be given to the provision of statute that the lot owner shall be liable to the city for all damages which the city may be compelled to pay for his default, we need

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not consider in this suit. It is enough to say here that an action grounded on that particular provision of the statute could only arise after the city had been rendered liable in a suit against it.

If the statute contemplated public duties only, the city ordinance could not go further and give individual rights of action. But neither we think has it attempted to do so.

The judgment of the Circuit Court must stand affirmed with costs.

The other justices concurred.

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(45 Mich. 180.)

Marriage — divorce — extreme cruelty.

A wife, against her husband's objection, went to the home of her parents to be confined. The husband at first refused to go to see her after her confinement, but at last went, and then told her that if she did not return before the next week's newspaper was published, he would "advertise" her, indirectly charged her with incest with her father, and intimated that the child was her father's; and the wife not returning, he did "advertise" her desertion. *Held*, extreme and wanton cruelty, warranting a divorce. (*See note, p. 463.*)

BILL for divorce. The opinion states the facts. The plaintiff had judgment below.

H. P. Henderson, for complainant.

M. V. & R. A. Montgomery, for defendant.

COOLEY, J. This is a bill for divorce on the ground of extreme cruelty. The parties were married in October, 1874. In October, 1875, a child was born to them, and in 1877 complainant was pregnant a second time, and went to the house of her parents a few miles away to remain until after confinement. The husband seems to have objected to this, but nevertheless went with her, and then returned to his own residence. When the second child was born she sent him word, but he did not come to see her, and in a few

days she sent her father over to ascertain why he did not come. The father testifies that "he said we had undertaken to run his business, and we might continue to do so; he should not run after her; she might go to the devil." This was repeated, and as the father was going away he said if his wife was not back as soon as she could come he should commence legal proceedings. When this was reported to complainant she wrote him a reproachful letter, and he then went to see her. According to the evidence he commenced the conversation by saying he had just got a letter from her full of lies, and he had come to warn her that if she was not back before the next week's paper was issued he should advertise her. He then turned to go away and she called him back, but this only made matters worse, for before he left, he by indirection charged her with incest with her father, intimated that the child just born was not his own, and said that if it had been it would have been born at home, but now it had been delivered where it belonged. At this time the wife was still confined to the bed. He actually went then, as he had threatened, and advertised her in the next issue of a local paper as having deserted him.

In the evidence produced nothing appears to justify or excuse the defendant's conduct, unless it is to be found in the wife's desire to be confined at her mother's notwithstanding his wish that she should remain and be confined at home. They were then living with his parents, and there was nothing unnatural or unreasonable in her desire to be with and have the assistance of her own mother. Few men under like circumstances, it is to be hoped, would have made objections. It put him to little or no trouble, and to no cost, and it did not interfere with ordinary household arrangements. His failure to visit his wife immediately on receiving notice of her confinement stands wholly unexcused, and his conduct when he did so fully justifies us in holding that it makes out a case of extreme and wanton cruelty, and would entitle the complainant to a divorce, without any aid from the subsequent insult in the newspaper. If she was a decent and self-respecting woman — and there is no evidence to the contrary — she could not with comfort cohabit as wife with the defendant afterward. *Briggs v. Briggs*, 20 Mich. 34. The decree granting a divorce must be affirmed.

An order for temporary alimony was made before final decree, and an execution issued for its collection. This is supposed to be authorized by Public Acts 1877, p. 32, but that statute applies to

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permanent alimony only. The order, so far as it awards execution, will therefore be reversed. The Circuit Court reserved the question of permanent alimony, and the custody of the children, and the record will be remanded that they may be dealt with.

The other justices concurred.

NOTE BY THE REPORTER.—*Briggs v. Briggs*, 20 Mich. 34, is not in point, for it was a case of persistent profane and indecent language on the part of the husband in presence of a young daughter, coupled with acts of violence and adultery. The court there said that such language "partakes of cruelty, even though it be not of that extreme character which would authorize a divorce." *Bennett v. Bennett*, 24 id. 432, and *Goodman v. Goodman*, 26 id. 417, cited by counsel, were cases of habitual indulgence in obscene language.

The principal case therefore is one of a single use in private of foul language, and an unfounded accusation of unchastity, and a public and baseless charge of desertion, without any evidence of any previous cruelty, or even of disagreement between the parties, nor of any deleterious effect upon the health of the wife, nor of any probability or prospect that the parties could not live harmoniously together thereafter.

Whether a divorce may be granted for a single act of cruelty has been differently held. Thus in *Hosball v. Hosball*, 51 Md. 72, s. c., 34 Am. Rep. 296, it was held that a single act of personal violence by husband to wife does not constitute "cruelty of treatment." To the same effect, *Barrere v. Barrere*, 4 Johns. Ch. 187. But such a single act was held in *Beyer v. Beyer*, 50 Wis. 254; s. c., 36 Am. Rep. 848, sufficient to warrant a divorce if accompanied by circumstances indicating a probability of repetition of similar conduct. So in *Cook v. Cook*, 3 Stockt. 195.

Harsh, profane, and indecent language, on a single occasion, even charging unchastity, but unaccompanied by personal violence or actual or implied threats of personal violence, and not producing bodily illness, has never before to our knowledge been held a sufficient basis for a divorce.

It has been held that a habitual course of such language, affecting the health, may warrant a divorce. *Powelson v. Powelson*, 23 Cal. 358. (The court here remarking upon *Rice v. Rice*, 6 Ind. 100, said: "The Supreme Court of that State, reviewing an instruction [refused by the court below] to the effect that a mere charge of adultery did not constitute cruelty, said: 'We may remark of that instruction that it seems to contemplate an entirely physical, sensual view of the married relation,' etc. This is a mistake. The instruction was given that a 'wanton and unfounded charge of adultery * * * may itself constitute a cause of divorce,' and the court said, this 'seems to us correct, but it is not necessary that we should so decide;' and the language quoted by the California court was uttered in reference to habitual and persistent 'silent neglect.'") So in *Lewis v. Lewis*, 5 Mo. 278, and *Kelly v. Kelly*, L. R., 2 P. & D. 31, where there were repeated charges of infidelity, made in presence of others. *Bray v. Bray*, 1 Hagg. Ec. 163, was a case of repeated charges of incest made before and after the birth of a child. In *Smith v. Smith*, 8 Or. 100, it does not clearly appear whether the accusation had been repeated, but it appears that it was made in the presence of others, and we infer that it had been made more than once. In *Otway v. Otway*, 2 Phill. 97, the husband had been "in the habit of following the wife" from room to room, accusing her of infidelity. This the court held amounted to menaces.

In the recent case of *Kennedy v. Kennedy*, 73 N. Y. 369, the complaint charged that the defendant had on various occasions charged the plaintiff with unchastity, had pointed a pistol at her, had ordered her out of the house, and threatened to murder her. The question was whether alimony should be granted *pendente lite*, and the court held that these allegations, although not entirely unequivocal, were not clearly insufficient to constitute a cause of action. On the point in question CHURCH, C. J., said: "Among many definitions" (of "cruel and inhuman treatment") "which will be found in the books, I think the following is concise and comprehensive: 'There must be actual violence committed with danger to life, limb, or health, or there must be a reasonable apprehension of such

violence.' 1 *Bish. on Marr. & Div.* 717, note 4. * * If it shall appear that the threats of violence were of such a character as to induce a reasonable apprehension of bodily injury, and that the charges of infidelity were made in bad faith as auxiliary to, and in aggravation of, the threatened violence, I think this plaintiff may be entitled to relief in this action. If on the other hand these charges were made in good faith, and especially if the defendant had reasonable grounds for believing them true, and if the threats proceeded from mere casual ebullitions of passion, and were used to emphasize the charges which the defendant had reason to believe were true, and without any real intention to inflict bodily harm, and if the plaintiff had no sufficient reason for so believing, it is clear she would not be entitled to a divorce. If a husband has reason to suspect his wife of infidelity, it is neither cruel nor inhuman to charge her with it, although personal violence is not justifiable." So in *Barlow v. Barlow*, 2 Abb. Pr. (N. S.) 259, the act of the husband in angrily expelling his wife from home, under suspicion of her unfaithfulness, was held not sufficient to justify a divorce. See also *Davies v. Davies*, 55 Barb, 130.

In *Wheeler v. Wheeler*, 58 Iowa, 511; s. c., 36 Am. Rep. 240, there was personal violence and verbal abuse in public. The court said: "No husband has a right to call his wife a 'slut' or 'whore,' without cause or provocation. If he does so for a length of time, in the presence of their children, who are of age to understand the meaning of such terms, and also in the presence of their neighbors and others, there can, it seems to me, be but one result, and that would be to grievously wound the feelings and utterly destroy his wife's peace of mind to such an extent as to impair her bodily health." "A man who persistently calls his wife a whore," etc.

In *Farnham v. Farnham*, 73 Ill. 497, the court said: "Two distinct acts of physical violence to the person of appellee are clearly proved. It is shown by testimony every way worthy of belief, outside that of appellee, that appellant on two occasions struck his wife in anger. This would constitute under our statute technical cause for divorce. No great physical injury was inflicted upon appellee on either occasion. But the jury could very properly consider the abusive language, which the evidence shows he applied to her, not only in their private room, but in the presence of strangers, as characterizing these acts of physical cruelty, and as giving to them a poignancy they would not otherwise have. It was proven he addressed her in the coarsest terms, language that implied a want of chastity. There is nothing that inflicts so deep and cruel a wound upon a pure wife as a false accusation of want of chastity, beside which the physical injuries proven in this case are as nothing. The law has made the one a cause of divorce, but not the other. It would be a reproach to our laws if it were not permissible for a wife to abandon a husband who should continually, without just reason, reproach her with a want of virtue and fidelity to her marriage vows. Happily the law will not require her to submit to any such degradation. While such conduct will constitute no grounds for divorce under our statutes, it will justify her in living separate and apart from her husband, where such cruel accusations will add no more to her weight of sorrow." The Illinois statute however specifies "repeated cruelty."

In *Day v. Day*, 56 N. H. 316, only two assaults were proved, and those not of a very aggravated nature. It was in proof that the husband used very violent language toward the wife, cursing her, and applying indecent epithets, and conducting himself so as to terrify her and the children, and make living with him intolerable. Held, that these facts furnished evidence from which the judge who heard the cause was authorized to find that the charge of extreme cruelty was supported.

In *Black v. Black*, 30 N. J. Eq. 221, the court said: "Slight violence by a husband who has evinced a hatred almost diabolical against his wife, in attempting to blast her reputation, by fabricating a charge of adultery against her, has been deemed sufficient. *Gracen v. Gracen*, 1 Green. Ch. 459; *Thomas v. Thomas*, 5 C. E. Gr. 97. Any husband whose sense of decency and justice is so completely destroyed as to be able deliberately to set on foot a scheme to fasten upon his wife a false charge of adultery is, in my estimation, capable of doing any thing a cruel heart can desire or a brutal mind invent, and any woman whose life must be spent in the seclusion of his home, and whose person is subject to his power, occupies a position of such constant and extreme danger as to have a right to the protection of the law whenever she demands it."

In *Cheatdam v. Cheatdam*, 10 Mo. 296, it was held that charges of infidelity are not "indignity to the person."

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In *Shaw v. Shaw*, 17 Conn. 189, the husband on various occasions had called the wife "an old hypocrite," "ugly devil," "old imp of hell," "worse than the women at the Five Points," and charged her with having been to New York to hold illicit intercourse. All this was held not to amount to "intolerable cruelty." The court said: "They were however accompanied by no act or menace indicating violence to her person. Such language if provoked cannot be justified; if unprovoked, is disgraceful; but when we look further, and find that he was jealous of his wife, it is not so much to be wondered at, as we have been told by authority, that 'jealousy is the rage of a man.' The unfortunate victim of this passion is indeed to be pitied; but the law furnishes no remedy for conduct like this. It may be intolerable, but is not intolerable cruelty." "The fancies of a jealous man are as ungovernable as those of a madman."

In *May v. May*, 62 Penn. St. 306, it was held that "a single act of indignity," as distinguished from personal violence, "will not be sufficient. There must be such a course of conduct or continued treatment as renders the wife's condition intolerable, and her life a burden to her."

Mr. Bishop says (1 Marr. & Div., § 736): "A groundless and malicious charge by a husband against his wife's chastity, or of incest, though not ordinarily deemed quite sufficient standing completely alone is, when the foundation for its admission is so laid, *i. e.*, by proof of acts tending to bodily harm, deemed a gross act of cruelty, almost enough of itself." We have looked at all the cases cited by Mr. Bishop to this statement, and find that none of them warrant the holding in the principal case. In every one the language was an accompaniment of violent acts, or was additional to such acts, or was persistently or frequently used. We must regard the principal case as a step in advance of previous adjudications.

BEECHER V. BUSH.

(45 Mich. 188.)

Partnership — participation in receipts of hotel as rent.

Where one merely hired the use of another's hotel from day to day, paying daily a sum equal to one third of the gross receipts and gross earnings, *held*, no partnership.

ACTION for goods sold. The opinion shows the facts. The plaintiff had judgment below.

Henry M. Cheever, John Atkinson and Jos. P. Whittemore, for plaintiff in error.

William V. Jackson and C. I. Walker, for defendants in error.

COOLEY, J. The purpose of the action in the court below was to charge Beecher as partner with Williams for a bill of supplies purchased for the Biddle House in Detroit. The facts are all found by special verdict, and are few and simple. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the

use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in the course of the business made this purchase. The proposals are set out in full in the special verdict.

The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case therefore is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership, these parties meant should be wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their

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agreements, and names go for nothing when the substance of the arrangement show them to be inapplicable. But every doubtful case must be solved in favor of their intent ; otherwise we should " carry the doctrine of constructive partnership so far as to render it a trap to the unwary." KENT, C. J., in *Post v. Kimberly*, 9 Johns. 470, 504.

We have then a case in which the party whom it is sought to charge has not held himself out, or suffered himself to be held out, as a partner, either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent ; and if he is one at all, it must be by construction of law.

What then are the *indicia* of partnership in this case ; the marks which force that construction upon the court irrespective of the intent of the parties ; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies ?

In the elaborate and able brief which has been presented in behalf of the defendants in error it is conceded, that the fact that Beecher was to receive each day a sum " equal to one-third of the gross receipts and gross earnings " for the day, would not necessarily make him a partner. What is claimed is that the fact is " cogent evidence " that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in *Hinman v. Littell*, 23 Mich. 484 ; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions. *Eager v. Crawford*, 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinc-

tion between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words. *Loomis v. Marshall*, 12 Conn. 69, 79 (30 Am. Dec. 596).

In *Cox v. Hickman*, 8 H. L. Cas. 268, 306, Lord CRANWORTH, stated very clearly his views of what should be the test of partnership. "It is often said," he says, "that the test, or one of the tests whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, *i. e.*, that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason, and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

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It is said, and we believe justly, in *Bullen v. Sharp*, L. R., 1 C. P. 86, that the decision in *Cox v. Hickman* brought back the law of England to what it should be, and Mr. Baron BRAMWELL, referring to what was declared to be law in *Waugh v. Carver*, 2 H. Bl. 235, expressed the hope "that this notion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books." P. 128. It is certainly overruled very conclusively in Great Britain. *Kilshaw v. Jukes*, 3 B. & S. 847; *Shaw v. Gault*, 16 Irish C. L. R. 357; *Holme v. Hammond*, L. R., 7 Exch. 218; *Ex parte Delkasse*, 7 Ch. Div. 511. And though in New York, the courts, hampered somewhat by early cases, have not felt themselves at liberty to adopt and follow the decision in *Cox v. Hickman* to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. Indeed that is very well shown in *Eastman v. Clark*, 53 N. H. 276; s. c., 16 Am. Rep. 192, where the authorities are collated. It must be admitted however that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. A few cases may be mentioned which in their facts have a resemblance, more or less strong, to the one before us.

Champion v. Bostwick, 18 Wend. 175 (31 Am. Dec. 376), was a case where parties, who were severally owners of horses and stages on different parts of one stage line, made an arrangement that the fares received by both should be divided between them in proportions agreed upon. This was held to constitute them partners, so that a third person injured by the carelessness of a driver employed by one might bring suit for the negligence of all. But in the somewhat similar case of *Eastman v. Clark*, 53 N. H. 276; s. c., 16 Am. Rep. 192, the conclusion of partnership or no partnership, it was said, must be drawn as one of fact. "The real and ultimate question," says SMITH, J. (p. 289), "in all cases like the present is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits, and those actually carrying on the business.' Whether such relation existed is a question of fact. * * * There is no sound foundation for an arbitrary rule of law requiring courts or juries to regard participation in the profits as a decisive test which

will in all instances necessitate the conclusion that the participator is liable for the debts."

In *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429, it appeared that by arrangement one party furnished the ground and the material for making brick, and also the fuel, and another was at the expense of burning the brick. The brick were then to be divided, the former receiving one-fourth, and the latter three-fourths, and the latter was also to pay the former ten dollars on each one hundred thousand bricks. This was held to create a partnership, and *Musier v. Trumbour*, 5 Wend. 274, and *Everitt v. Chapman*, 6 Conn. 347, were relied upon as authority.

The New York cases might support this decision, but the case of *Loomis v. Marshall*, 12 Conn. 69, can hardly be considered in accord with it. The facts were these: B. had a cloth factory. A. agreed with him to furnish a full supply of wool for two years, B. to devote the factory for two years exclusively to manufacturing, and the net proceeds, after deducting the incidental expenses and costs of sale, were to be divided in the proportion of 55 per centum to A., and 45 per centum to B., and the cost of manufacture was to be shared in like proportion. This was held no partnership. Says HUNTINGTON, J.: "This community of profit is the test to determine whether the contract be one of partnership; and to constitute it a partner must not only share in the profits, but share in them as a principal; for the rule is now well established that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner." And of the share set off to B. he says, it "is not expressed in terms to be for such compensation; but this is its legal meaning." pp. 77, 79. *Moore v. Smith*, 19 Ala. 774; *Bowman v. Bailey*, 10 Vt. 170, and *Price v. Alexander*, 2 Greene (Iowa), 427, may be referred to for similar views.

One of Chief Justice GIBSON's short, but very lucid, opinions is in point here. Between Bronson, a manufacturer, and Dunham, a country merchant, there was an agreement that the former should furnish wooden handles made to order to the latter, at a tariff of prices to be paid out of the store, on the proceeds of the handles; Bronson finding the labor and stuff, and receiving a further compensation for skill, and the rent of the store-house, in the form of a commission of fifty per centum on the net profits of the whole. It was sought to charge Dunham as a partner with Bronson for the

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price of raw material the latter had bought. Upon these facts it is said: "Now it has been so often and so invariably ruled in England and America that a commission on profits is not such an interest in the concern as constitutes partnership that the point is at rest. What staggers the mind in this instance is the apparent shallowness of the distinction, when it is considered that a commission of fifty per cent is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle; and that whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same. But by the terms of the contract Bronson, and not Dunham, was to procure and pay for the stuff; and they were not to be partners in that part of the business. This provision, I admit, would be inoperative against strangers, if the parties had held themselves out to the public as partners, both in buying and selling; but assuming for the moment that there was indeed a partnership in the handles when furnished, and in the store when stocked with goods, yet it is to be borne in mind that the handles, as well as the store goods, were to be put into the concern as separate contributions to the joint-stock; and that as the stuff for the handles was to be procured by Bronson it was consequently to be paid for by him just as the store goods were to be procured and paid for by Dunham, having been purchased on separate account. There may be a partnership for selling and not for buying; or for buying and not for selling; or for both buying and selling, which is the most usual, as if several put separate quantities of wheat into a common stock to be ground into flour, and sold on joint account; or agree to buy jointly, and divide the article when bought; or agree to buy and sell on joint account. In the first case each would be liable for his own purchases only; but in the second and third cases each would be liable for the whole. Now if there were any partnership in this instance it would be of the first class; and in any view of the case the defendant would not be liable." *Dunham v. Rogers*, 1 Penn St. 255, 262.

Not dissimilar to this is the case of *Denny v. Cabot*, 6 Metc. 82, which was also a case in which one party supplied the raw material, and another manufactured it, and was to receive one-third part of the net profits. This proportion, it was found, was to be received by the manufacturer only as a compensation for his labor and ser-

vices; and it was held perfectly competent to provide for making compensation by such a standard without constituting a partnership. *Perrine v. Hankinson*, 11 N. J. 181, is relied upon as authority among other cases. The same doctrine was reiterated in *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58; *Bradley v. White*, 10 Metc. 303; and by DAY, J., in a careful opinion in *Harvey v. Childs*, 23 Ohio St. 319; s. c., 22 Am. Rep. 387, already referred to.

It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that in so far as the notion ever took hold of the judicial mind, that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers however by agreement between the parties themselves may be restricted at option to the extent even of making one the sole agent of the others, and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the mutual arrangement does it appear that either of the parties clothed the other with an agency to act on his behalf in this business? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively, and charges made in proportion to what they demand, or on the other hand, that the tables shall be plain and cheap, so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in

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the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive, or receive one that Williams rejected as unfit? In short what one act might he do or authority exercise, which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and therefore have not deemed it necessary to exclude.

On the other hand what single act are we warranted in inferring the parties understood Williams was to do for and as agent of Beecher? Not to furnish supplies, surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be met by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of his contract. If the business was managed badly Beecher might be a loser, but how could he help himself? He had reserved no right to correct the mistakes of Williams, supply his deficiencies or overrule his judgments. He did indeed agree to take and account for whatever furniture should be brought into the house by Williams, but the bringing any in was voluntary, and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration of that which Beecher supplied, and it was quite possible that as between himself and Williams, there might be

nothing to pay. And while Williams was not compellable to put any in, Beecher on the other hand had no authority to put any in at the cost of Williams.

It is plain therefore that if there is any agency in this case for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of their plain intent that none shall exist. If therefore we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something, in order that that something may be the foundation whereupon to erect an implication of something else, is a mere absurdity. The test of partnership must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary, and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked any one of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams. Being in possession he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies or for servants' wages, and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which Williams' assent was required.

There is another view of this case that seems to use conclusive. It is urged on behalf of defendants in error that Beecher was a dormant partner. Now a dormant partner is a secret partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business. Was this the case here? Nothing in the record indicates it. Beecher was in possession of the hotel, and we must suppose had his clerk there. These were facts open and patent to the whole world that had occasion to go there or deal with Williams. They naturally

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suggested the inquiry what was the arrangement between the parties, and there is nothing in the case to indicate that plaintiff in error would not have learned all the details of the arrangement had they made the necessary inquiries. There is no indication anywhere of intended secrecy. If therefore there was any partnership at all, it existed because the contract and the open and public conduct of business under it created one, and the right of the defendants in error to recover must depend upon whether they had a right, with the contract before them, to understand that they were furnishing supplies on the credit of Beecher? Would they have had this right? If so, no interference of Beecher, and no notice to them not to sell to Williams relying on Beecher's credit, would have been of the least avail. If he had said to them, "Gentlemen, by our contract Mr. Williams furnishes all the supplies; I do not and cannot control in respect to quality, quantity or cost; he alone, by our understanding, is to pay for them, and I forbid you to sell on my credit;" it would all have been useless. On their view of the case he was bound by an iron rule of the law, from which it would have been impossible to rescue his credit until the arrangement with Williams should in some manner be terminated. And this would have been the case also even if the arrangement with Williams had been a secret one, and Beecher had attempted to protect himself by disclosing its terms. This is as much as to say that parties are not at liberty to contract as they please, even when they propose nothing wrong and do nothing unfair to any one. But we cannot bring our minds to this result.

Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership, and the third persons have not been misled by concealment of facts or by deceptive appearances.

The judgment must be reversed with costs and a new trial ordered.

The other justices concurred.

WINFIELD V. DODGE.

(45 Mich. 355.)

Sunday — contract — ratification — replevin.

Replevin lies for a horse sold and delivered on Sunday, although the contract was ratified on a week day.*

REPLEVIN. The opinion states the facts. The defendant had judgment below.

Hewlett Bros. and Austin Bair, for plaintiff in error.

Thomas A. Wilson, for defendant in error.

GRAVES, J. The parties traded horses on Sunday. The exchange was even and there was immediate delivery. The plaintiff became dissatisfied and wishing to trade back, went the next morning to the defendant's place and made several offers of money to induce him to do so, but he refused. After some bantering however the defendant gave the plaintiff five dollars and a tobacco pipe, for the purpose, as explained at the time, of averting ill feeling. The plaintiff then returned home, but wishing on further consideration, to undo what had been done, he again called on the defendant and peremptorily insisted on trading back, and he offered to restore the money he had received and something more than the value of the pipe. The defendant refused to listen to any overture.

The plaintiff then brought replevin before a justice and obtained judgment and the defendant appealed. The Circuit judge, on the close of the evidence, took the case from the jury and ordered a verdict for the defendant. This ruling went on the theory that the transaction on Monday amounted to a new contract by which the title became established in defendant, and that no room from any other view existed.

We think this was error. The case made by the evidence was not necessarily of the character assumed. The transaction on Sunday passed no title. As a trade it was void, and the evidence of what

* See *Kinsey v. McDermott* (55 Iowa, 674), 39 Am. Rep. 191. *Contra Van Hoven v. Irish*, 10 Fed. Rep. 13

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took place on Monday was not conclusive that there was any thing more than an attempt to ratify and validate the Sunday negotiation ; and of course a ratification of that trade was impossible ; unless there was a new contract the plaintiff was entitled to reclaim his horse against the void negotiation. No new contract could be made without a mutual assent of the parties, and unless the plaintiff intended to make one the title was not affected by the occurrences subsequent to the transaction on Sunday, and whether there was such new contract was a question for the jury on the whole evidence under proper instructions.

The judgment must be reversed with costs and a new trial granted.

Judgment reversed.

All the other justices concurred.

WIEMAN V. MABEE.

(45 Mich. 484.)

Libel — privileged communication — " bad moral character."

To prevent a town superintendent of schools from licensing an applicant as a teacher, persons interested in the school in question represented to the superintendent, in a petition and affidavit, that the applicant was a person of bad moral character and unfit to have charge of a school. Being sued by him for libel they justified, and showed that he was habitually profane and a Sabbath breaker. *Held*, (1) that the justification was made out ; (2) that the communication was privileged.*

ACTION of libel. The opinion states the facts. The defendant had judgment below.

Irving D. Hanscom and A. B. Maynard, for plaintiff in error.

James B. Eldredge, for defendant in error.

CAMPBELL, J. Plaintiff sued defendants for libel in publishing of him that he was a man of bad moral character, and wholly unfit to teach and have the care of a district school. This charge was made in an affidavit made by some of the defendants, and a petition

* See *Kirkpatrick v. Eagle Lodge*, ante, 318.

of others directed to the superintendent of schools of the township of Lenox, in Macomb county, and the papers were intended to prevent the licensing of Wieman as a teacher in the district where the signers lived. The declaration, in addition to general damages, averred that the plaintiff was thereby deprived of getting such license.

The defense rested on the privileged character of the publication and also averred, by way of justification, that Wieman was a habitual blasphemer and profane person, and an open violator of the Sabbath by hunting, sports and in other ways.

On the trial there was no testimony tending to prove that these papers were got up for any purpose or used for any purpose except to be laid before the superintendent of schools to prevent his granting a license to Wieman. It also appeared that the papers were drawn by counsel as expressing properly the result of the charges of the parties, which were detailed to him in full, and related mainly to the bad language and Sabbath-breaking acts of plaintiff, and that they were informed the papers were shaped as they should be for that purpose. It appeared further that in laying the papers before the superintendent they explained to him fully that their objections were the same before referred to and no other, and were accompanied with manifestations of an entire absence of personal ill will.

There was evidence of his general good character in other respects. There was also evidence of his habitual use of profane and bad language before his scholars as well as elsewhere, and of such open and conspicuous Sabbath-breaking as offended his neighbors. There was some dispute concerning one or two acts, but none upon the general result.

The court below held the communication was privileged unless both false and expressly malicious. It was also held that a man who habitually violated his duty by profanity and Sabbath-breaking was of bad moral character.

If this had been a libel published generally, and without reference to any particular purpose, it is very probable that its meaning might be regarded as covering a kind of conduct different from that proved against plaintiff here, and that by reason of the difference a justification might not be complete that went no further. Language does not always and in all places convey the same impression, and a person is liable for the meaning that is most natural, and is actually, by his own fault, fairly accepted under the circumstances.

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But on the other hand, where the meaning intended to be conveyed, and actually understood, is shown, there can be no responsibility incurred for any other. In the present case the writings were understood by the superintendent precisely as they were meant to be. It was his duty by law to give no license to any one unless such as "he shall deem qualified in respect to moral character, learning, and ability to instruct and govern a school." Laws 1875, p. 36. We do not think any superintendent would need vindication for being dissatisfied with the moral character of a teacher who has the faults complained of by these parties who opposed the licensing of plaintiff. A superintendent who should subject young children to such influences, would be very censurable.

In the present case the communication was fully privileged. It was made by persons interested in the school, to the person qualified to receive and act on the petition, for an honest purpose, and with an honest belief in the justice of their action. In such cases no action can be maintained even if the complaint is untrue, if not maliciously made. *Foster v. Scripps*, 39 Mich. 376; *Dickeson v. Hilliard*, L. R., 9 Exch. 79; *Harrison v. Bush*, 5 El. & Bl. 344.

There is no error in the proceedings and the judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

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(45 Mich. 512.)

Deed — lunacy of grantee — administrator's right to avoid.

The unconditional delivery of a deed to a third person for the use of a lunatic grantee not under guardianship, followed by circumstances indicating acceptance by the grantee, is a valid delivery.*

The administrator of an insane grantee cannot avoid a deed to him and recover the consideration paid.

ACTION for money deposited. The opinion states the facts. The defendant had judgment below.

* See *Byars v. Spencer*, ante, 212.

Chas. M. Swift and Alfred Russell, for plaintiff in error.

Otto Kirchner, for defendant in error.

GRAVES, J. The court below, after hearing the evidence, directed a verdict for defendant, and the general question is whether the plaintiff is entitled to complain of this ruling.

Margaret Hack, otherwise called Margaret Taufkirch died in March, 1870, and the plaintiff was appointed administrator in August, 1880. As shown by his testimony the plaintiff's case presents in substance the following state of facts :

In 1863 decedent placed \$1,276 in defendant's hands and received his note therefor ; that she drew the amount down to \$910 ; that in the summer of 1868 she fell into a state of *dementia* bordering on idiocy, and that whilst she was in that condition an arrangement was made by defendant with her, by which he was to deed to her a house and lot on Sherman street in Detroit for the \$910 remaining in his hands, the property being fairly worth that amount ; that on the fourth of January, 1869, and in accordance with this arrangement, the defendant executed the deed and acknowledged it before Eugene Fecht and then delivered it to that gentleman to be by him delivered to decedent, and the note held by decedent for the money was returned to defendant ; that the deed was placed on record, and decedent, together with two of her children and Mr. and Mrs. Cuff, immediately proceeded to occupy the place, the latter acting as decedent's nurse ; that after some few weeks decedent wanted to return to her former residence, and on this account such occupation was discontinued ; that at her death in 1870 she left three children her sole heirs-at-law, and that two of them subsequently deeded their interest, more or less, to the defendant for a money consideration which he paid. There are some other incidents, but they are not important on this inquiry.

The action is claimed to be for the recovery of the residue of the old deposit, and plaintiff's counsel has ingeniously arrayed the facts and has sought to place the defendant in the attitude of a debtor who is called on to make proof of payment by means of a regular transfer of land. The defendant, it is argued, must acquit himself by satisfactory proof of payment and hence must show that the transfer of the house and lot in exchange for the \$910 was binding on the decedent. But this is scarcely a just theory. The plaintiff

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has found it to be impossible to get his case before the court without showing a state of facts not in unison with such view. When all refinements and all technicality are put aside, it seems to be the meaning of the proceeding to evade all questions of liability respecting the re-establishment of rights and interests as they were prior to the giving of the deed, and by means of an action at law simultaneously avoid the conveyance and compel the defendant to refund the consideration.

In passing it occurs to observe that any attempts to deal with a transaction of this nature and which is complicated by such incidents as are here manifest, in an ordinary suit at law, must be attended by very serious difficulties, and that in case of the existence of any substantial cause for judicial interference it might be well to consider whether the remedy should not have to be sought in a court of equity where all persons interested could be made parties and all rights and liabilities be equitably and safely adjusted. For the purpose of this review the decedent's state of imbecility, as represented by the plaintiff, must be admitted.

The first point requiring notice relates to the delivery of the deed ; and in regard to this it is argued that if the facts are viewed apart from the circumstance that decedent was imbecile, the law will not consider them as amounting to a delivery. Upon this question the authorities are decisive against the plaintiff. *Hosley v. Holmes*, 27 Mich. 416 ; *Latham v. Udeil*, 38 id. 238 ; *Gardner v. Collins*, 3 Mas. 398 ; *Gould v. Day*, 94 U. S. 405 ; *Church v. Gilman*, 15 Wend. 656 (30 Am. Dec. 82) ; *Lady Superior of Cong. Nunnery of Montreal v. McNamara*, 3 Barb. Ch. 375 ; *Concord Bank v. Bellis*, 10 Cush. 276 ; *Regan v. Howe*, 121 Mass. 424 ; *Hastings v. Merriam*, 117 id. 245 ; *Buffum v. Green*, 5 N. H. 71 (20 Am. Dec. 562) ; *Merrills v. Swift*, 18 Conn. 257 ; *Frost v. Peacock*, 4 Edw. Ch. 678 ; *Tompkins v. Wheeler*, 16 Pet. 106 ; *Tibbals v. Jacobs*, 31 Conn. 428 ; *Jones v. Swayze*, 42 N. J. 279 ; *Mitchell v. Ryan*, 3 Ohio St. 377 ; *Berry v. Anderson*, 22 Ind. 36, 39 ; *Kingsbury v. Burnside*, 58 Ill. 310 ; s. c., 11 Am. Rep. 67 ; *Robinson v. Gould*, 26 Iowa, 89 ; *Kerr v. Birnie*, 25 Ark. 225 ; *Farrar v. Bridges*, 5 Humph. 411 ; *Wesson v. Stephens*, 2 Ired. Eq. 557 ; *Doe v. Knight*, 5 B. & C. 671.

It is next contended that the deed was prevented from taking effect in consequence of the want of proper understanding by decedent to make an intelligent acceptance. The final meaning and effect of this argument is that an idiot or lunatic cannot take at

all by deed. Such must be the result if an intelligent acceptance by the donee or grantee is necessary for the vesting of the title when the gift or grant runs to one in that condition. But the law is otherwise. Lord COKE says that "a man of non-sane memory may, without the consent of any other, purchase lands" (lib. 1, c. 1, § 1, 2b) and that "persons deformed having human shape, ideots, madmen, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures, have power to purchase and retaine lands or tenements" (3b); and see 2 Bl. Com. 291; 1 Stephen's Com. 441, 442; 2 Broom & Had. Com. (Am. ed.) 714; 2 Washb. R. P. (1st ed.) 567; 3 Bac. Ab. Idiots and Lunaticks, D; Touchstone, Feoffment, 204; Grant, 235. Alluding to this, Chief Justice SHAW observed that a good conveyance could be made by a deed-poll to a lunatic although the grantee would be under a legal disability to make a conveyance, and that the delivery to a third person unconditionally for the use of the grantee would give effect to the deed. *Concord Bank v. Bellis, supra.*

The rule of course may not apply to an instrument which goes further, and assumes to impose a burden, liability or obligation on the grantee, and there is no occasion to inquire whether a deed would operate in case the incapable grantee were under guardianship. The transaction in question is the simple case of a deed-poll lawfully delivered to a third person unconditionally for the use of decedent and followed by circumstances inclining toward actual acceptance. The objection that the deed was wholly void is substantially answered by what has been said. It could not be so, and at the same time take effect as a conveyance. The authorities last cited are sufficient. The rule contended for would cause great hardship as well as mischief. A gift or grant unfettered by any condition, and however just and beneficial in itself (not being for necessities), would, if made to a person not capable of expressing acceptance by intelligent action, be nugatory and totally unavailable to him. No grant or gift except for necessities could vest in such a person in the absence of trust or guardianship.

The general rule is that transactions which are not necessarily binding are yet to be considered as standing until regularly assailed by some one whose position or interests entitle him in the view of policy or justice to assail them, and the cases where transactions are regarded as having no force at all as between any persons or any parties for any time whatever, are comparatively few and the pres-

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ent is not one. The title vested in decedent and at her death descended to her heirs, and admitting, though not deciding, that she might have maintained an action of this kind had she regained understanding, or that her guardian as lawful manager of her property and interests, in case one had been appointed, might have done so, and in each case on the ground that the action prosecuted by such a plaintiff to regain the consideration would in itself be a waiver or rejection of the grant, the circumstances are now wholly different. It will be conceded probably that the right to have back the money cannot exist, unless the transaction, which at the utmost is only voidable and not void, is actually avoided.

No one can at the same time insist that a contract is in force and is not in force, nor recover on a basis which his proceedings contradict; and whilst a voidable transaction remains unvoided, it operates as one that is binding; and no action that contemplates it as one which has been avoided can be maintained. The result is that if the arrangement with decedent has been suffered to remain, which is a fact unquestioned, and if this action has no force to avoid it, a complete denial is necessarily implied of all right to recover what is sued for. Is there then any efficacy in this case to avoid that arrangement? The answer is obvious. The administrator has no power, either directly or indirectly, to waive the conveyance. The law casts the right on the heirs who have the title by descent (Coke on Litt. 2b, and Bac. Ab. *supra*) two of whom seem to have dealt with the premises in a manner wholly at variance with any right of avoidance.

An administrator has no commission from the law to intervene and by his election unsettle the landed possessions held by the heirs through inheritance, on the specific ground that the ancestor, at the time when the property vested in him, was not of sound mind. Neither is it his province to proceed in disregard of the fact, whether the heirs have or have not elected to abide by the grant, and sue to reclaim the purchase money.

As something has been said about the defendant's mode of dealing with the two heirs in obtaining their deeds, it may be proper to observe that whether he acted fairly and justly therein does not concern the administrator, and is not a question to be adjudicated in this action. Whatever grievance the heirs may have in that regard must be redressed on their complaint.

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While disagreeing with the plaintiff, we do not fail to recognize the skill displayed by his counsel.

Judgment must be affirmed with costs.

Judgment affirmed.

MARSTON, C. J., and COOLEY, J. concurred.

CAMPBELL, J., did not sit in this case.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

FERRIS v. CARSON WATER COMPANY.

(16 Nev. 44.)

Contract — want of privity — assignment of claim.

A water company, contracting to supply a municipal corporation with water to extinguish fires, is not liable to a citizen for breach of that contract, whereby his property was burned, nor is it liable to the city in damages by reason of diminution of taxable property.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

N. Soderberg, for appellant.

R. M. Clarke, for respondent.

BELKNAP, J. The complaint in this case contains two counts, to each of which the defendant demurred generally. The demurrer was sustained by the District Court, and the case comes before us upon an exception to this ruling. In one count it is alleged that the defendant entered into a contract with the town of Carson

City, a municipal corporation, on behalf of, and for the benefit of its inhabitants, to supply it with water for the extinguishment of fires. That for this purpose fire plugs were established at various places in the town, and among other places, at a point within a convenient distance of plaintiff's building. That a fire occurred in premises adjoining plaintiff's, and by reason of the failure of defendant to keep the pipes connecting with the fire plugs charged with water under sufficient pressure, as was its duty under the contract, the fire communicated to plaintiff's building and destroyed it. That in consideration of the contract and of moneys paid thereunder by the town of Carson City to defendant, it became liable unto plaintiff for the damages arising from the neglect above mentioned.

The question presented by this count is whether, upon a breach of contract between the municipality and the water company, the plaintiff, whose property was destroyed through the failure of defendant to perform its obligation, has a right of action for damages.

It will be observed that plaintiff is not a party to the contract. It is a general rule of law that a stranger to a contract cannot claim its benefits in an action upon it. An exception to the rule exists in favor of persons for whose benefit a contract has been made, and it is urged in support of the declaration that as this contract was made for the benefit of plaintiff and the other tax-payers and residents of the town, the case falls within the exception.

But a third person, not a party to a contract, and for whose benefit it may have been made, does not in all cases have a right of action upon it. To entitle him thereto there must be some privity between him and the promisee, and some obligation or duty owing from the latter to him, which would give him a legal or equitable claim to the benefit of the promisee, or an equivalent from him personally. "A legal obligation or duty owing from the promisee to him" (the person for whose benefit the contract is made) "will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration with the promisee, the obligation of the promisee furnishing an evidence of the interest of the latter to benefit him, and creating a privity by substitution with the promisor." *Vrooman v. Turner*, 69 N. Y. 284; s. c., 25 Am. Rep. 195.

Other exceptions doubtless exist, but the plaintiff's case is within none of them.

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The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property-holders of the town, but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist in order to give him a right of action upon the contract. *Davis v. Clinton Water Works*, 54 Iowa, 59; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; s. c., 33 Am. Rep. 1.

The other count sets forth, in addition to the matter above stated, that prior to the destruction of the plaintiff's premises he had been accustomed to pay, and but for defendant's negligence aforesaid would have continued to pay a large amount of money annually for taxes to the town of Carson City. That by reason of the failure of defendant to perform its obligation the town of Carson City was damnified in the sum of one thousand dollars by diminution of its taxable property.

An assignment and ownership in plaintiff of the demand and right of action of the town against the defendant is set forth. The question presented by this count is whether the municipality had such an interest in the property destroyed as to give it a right of action against the defendant. We have not been referred to any authority supporting this declaration, and we apprehend none can be found. The cases to which we have been referred in support of the theory that the town had such an interest in the property as would entitle it to recover upon this count are insurance cases, and are inapplicable to the question here presented. There is a wide difference between the interest that will entitle a party to recover in an action for a tort and an insurable interest.

"An insurable interest," said the Supreme Court of Iowa, in *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 468; s. c., 7 Am. Rep. 160, "is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Yet such a connection must be established between the subject matter insured and the party in whose behalf the insurance has been effected, as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of the injury to it."

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In actions of the character of the present one the interests in the property destroyed, in order to be the basis of an action, should be certain and substantial. The right of taxation vested in the authorities of the city by the legislature did not create an interest, but rather an expectation, which was subject to have been defeated by contingencies that may have arisen, and was altogether too remote to be the foundation of a right of action.

The order and judgment of the District Court are affirmed.

Judgment affirmed.

STATE V. AH CHEW.

(16 Nev. 50.)

Constitutional law — prohibition of opium — exclusion of Chinese jurors.

A statute prohibiting the sale of opium is constitutional.

Chinese may be lawfully excluded from juries on the ground of alienage.

CONVICTION of selling opium. The opinion states the case.

E. R. Garber and Alexander Wilson, for appellant.

M. A. Murphy, attorney-general, for respondent.

HAWLEY, J. Appellant was indicted, tried, and convicted of a felony for a violation of section 1 of the "act to regulate the sale or disposal of opium," etc. Stat. 1877, 69. This section provides that "it shall be unlawful for any person or persons, as principals or agents, to sell, give away, or otherwise dispose of any opium in this State, except druggists and apothecaries, and druggists and apothecaries shall sell it only on the prescription of legally practicing physicians." The charging part of the indictment reads as follows: "The said defendant, Ah Chew, on the 30th day of April, A. D. 1880, or thereabouts, and before the finding of this indictment, at the county of Eureka, in the State of Nevada, did unlawfully and feloniously sell and dispose of opium, of the value of fifty cents, United States silver coin, to one Frank Connor, contrary to the form of the statute in such

cases made and provided, and against the peace and dignity of the State of Nevada.

[Omitting a point of pleading.]

2. Section 1 of the statute above referred to does not conflict with any of the provisions of the Constitution of this State. It does not interfere with the existing rights of property. It does not impair the obligation of any contract, and is not special legislation in the interest of a designated class.

It has universally been held to be the duty of every State to protect its citizens, and advance the safety, happiness, and prosperity of its people; and there is no doubt as to the power of the legislature to pass laws, like the one under consideration, designed to promote the health and protect the morals of the community at large. Statutes to regulate the sale of intoxicating liquors; to prevent and prohibit their sale to minors, to Indians, to habitual drunkards; and to close saloons on the Sabbath and on election days, have been passed in many, if not all, of the States, and have always been upheld and sustained by the several State courts, and by the Supreme Court of the United States. *License Cases*, 5 How. 504.

It is not denied that the indiscriminate use of opium by smoking or otherwise tends in a much greater degree to demoralize the persons using it, to dull the moral senses, to foster vice and produce crime, than the sale of intoxicating drinks. If such is its tendency it should not have unrestrained license to produce such disastrous results. A law prohibiting the indiscriminate traffic in this poisonous drug, and placing the trade under such regulations as to prevent abuses in its sale, violates no constitutional restraints. Under the police power, recognized in the theory and asserted in the practice of every State in the Union, in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the legislature has authority to place such restrictions upon the sale or disposal of opium as will mitigate if not suppress its evils to society.

Wynehamer v. People, 13 N.Y. 378, upon which appellant relies, is not opposed to the views we have expressed. The decision in that case was based upon the ground that the act there under consideration confiscated and destroyed property lawfully acquired by the citizen in intoxicating liquors, and provided for its seizure and destruction without due process of law. The opinions of the

various justices in that case expressly recognized the right of the legislature to regulate the sale and disposal of intoxicating liquors, "upon such views of policy, of economy or morals, as may be addressed to its discretion." The subsequent decisions in that State have always recognized the right of the legislature to control and regulate the traffic in intoxicating drinks.

WRIGHT, J., in delivering the opinion of the court in *Metropolitan Board of Excise v. Carrie*, 34 N. Y. 666, upon this subject, says: "The right to legislate on a subject so deeply affecting the public welfare and security has not heretofore been questioned or denied, and it could not well be, for it would have been to deny the powers of government inherent in every sovereignty to the extent of its dominions. A State is not sovereign without the power to regulate all its internal commerce as well as police. The legislature exercises and wields these sovereign police powers as it deems the public good to require. It is a bold assertion at this day that there is any thing in the State or United States Constitutions conflicting with or setting bounds upon the legislative discretion or action in directing how, when, and where a trade shall be conducted in articles intimately connected with the public morals or public safety or public prosperity; or indeed to prohibit and suppress such traffic altogether, if deemed essential to effect those great ends of good government. * * * Is it not an absurd proposition that such a law, by its own mere force, deprives any person of his liberty or property within the meaning of the Constitution, or that it infringes upon either of these secured private rights? Yet this is the only ground its violators can occupy to raise any question as to its validity. They are restrained of no liberty, except that of violating the law by engaging in a forbidden traffic; and the assumption is not even plausible that the act works a deprivation of property to any one."

The Supreme Court of Delaware, in *State v. Almond*, 2 Houst. 612, declared the act (for the suppression of intemperance) prohibiting the sale of intoxicating liquor for any other than "mechanical, chemical, and medicinal purposes only, and pure wines for sacramental use," to be constitutional.

The *Wynehamer* case was there elaborately reviewed, and it was shown that each of the justices who decided against the constitutionality of the prohibitory liquor law of New York based his opinion on grounds of objection that were not applicable to the

Delaware act, and sustained the principle of restrictive legislation to the full extent required to support its validity. After an examination of many authorities upon the subject under consideration, we are prepared to reiterate and indorse the statement of WRIGHT, J., in the opinion from which we have quoted, that: "No one heretofore has questioned, on constitutional grounds, the validity of such an enactment, or called upon the judiciary to declare it void, and perhaps would not at this time, except as emboldened by the inconsiderate *dicta* of some of the judges in the case of *Wynehamer v. The People*."

3. Appellant contends that the court erred in overruling his challenge to the panel of trial jurors, "because the law under which the venire was drawn is unconstitutional and void in this, that it conflicts with the fourteenth amendment of the Constitution of the United States, with sections 1977 and 1978, Rev. Stats. U. S., and article 6 of the treaty between the United States and China, of July 28, 1868.

This position is wholly untenable. It cannot be maintained upon any sound reasoning, and is not supported by any authority. In construing the constitutional amendments and the Civil Rights Bill courts have always considered the history of the times when they were adopted, the general objects sought to be accomplished, and the evils they were designed to remedy. Their object was to secure to the African the civil rights which the white persons of the United States enjoyed, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by any State.

The amendments were primarily designed to give freedom to all persons of the African race within the United States, to prevent their future enslavement, to make them citizens, to prevent discrimination against their rights as freemen, and to secure to them the privileges of the ballot. The language used necessarily extends some of the provisions to all persons of every race and color; but their general purpose is so clearly in favor of the African race that it would require a very strong case to make them applicable to any other. *Slaughter-house cases*, 16 Wall. 37; *Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, id. 313; *Ex parte Virginia*, id. 339.

The amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United

States. The treaty between the United States and China did not confer upon the Chinese coming to this country the right of citizenship. The same section which guaranteed to the Chinese subjects certain "privileges, immunities, and exemptions in respect to travel or residence," contains the following proviso: "But nothing herein contained shall be held to confer naturalization upon * * * the subjects of China in the United States." Section VI.

The statute of this State provides that "every qualified elector of the State * * * is a qualified juror of the county in which he resides." 1 Comp. L. 1051. The statute does not deprive appellant of any right secured to him by the Constitution, laws, or treaty. The Mongolian or yellow race, to which appellant belongs, are denied the right to serve as jurors, because they are aliens, and noton account of their color. There is no discrimination in the statute against a person because of his race or color.

Appellant had all the privileges guaranteed to the subjects of the most favored nation. He had the same rights as an unnaturalized white person from England, Germany, or any other foreign country. No greater rights could have been secured to him in the Circuit Court of the United States. The qualification of jurors is the same in the United States Courts as in the State Courts. Rev. Stat. U. S., § 800; Stats. U. S., 1874-5, p. 336, § 4. The privilege, or duty, of being a juror is not always an incident of citizenship. There are citizens of the United States that are in the respective States denied the right to sit as jurors in the trial of civil or criminal cases.

Women are citizens, but they are not under the Constitution and laws of this State, "qualified electors." They have no right to vote or hold any office. Yet they have the same right to a fair and impartial trial by jury as any other person. Some of the States limit the age of male citizens who are declared competent to serve as jurors. Yet it has never been held that a citizen over or under the prescribed age was denied any right secured to him by the Constitution and laws of the United States. All persons, whether male or female, old or young, citizens or aliens, white, black, or yellow, are equally protected in the right of trial by a fair and impartial jury, indifferently selected, without discrimination because of their race or color.

The statute of West Virginia, which was called in question in

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Strauder v. West Virginia, supra, reads as follows: "All white male persons, who are citizens of this State, shall be liable to serve as jurors." The Supreme Court of the United States declared this law to be unconstitutional, because it singled out and expressly denied to the colored race "all right to participate in the administration of the law as jurors, because of their color, though they are citizens and may be in other respects fully qualified."

In the discussion of the questions there involved, the court expressly recognized the general principles we have announced, and declared that every State has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. This is the language used: "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it is clear that it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discrimination against those who belong to it."

The argument that equal protection to persons can only be secured by allowing persons of the same race or color to act as jurors in cases affecting their interests, is fully answered by the Supreme Court of the United States in the case of *Virginia v. Rives, supra*, in reply to the application of two colored persons to have their cause removed from the State Court to the Circuit Court of the United States. The statute of Virginia provided that all male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the Constitution and laws, are liable to serve as jurors. The law of that State, like the law of this State, did not discriminate against any person because of his race or color. Petitioners alleged that the grand jury that indicted them, and the petit jury that tried them, were composed wholly of the white race, and that no one of their race had ever been allowed to serve as jurors, in the county where

they were tried, in any case in which a colored man was interested. The court say that these assertions "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected. Nor did the refusal of the court, and of the counsel for the prosecution, to allow a modification of the venire, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person, by the law of the State, or by any act of Congress, or by the fourteenth amendment of the Constitution. It is a right to which every colored man is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia or by any Federal statute. It is not therefore guaranteed by the fourteenth amendment or within the purview of section 641."

The question whether any person of the Mongolian race can become a naturalized citizen of the United States is not involved in this case, and does not therefore merit any discussion.

4. The evidence in this case was very slight and in some respects very unsatisfactory. But we are not prepared to say that there was no evidence to sustain the verdict of the jury.

The judgment of the District Court is affirmed.

Judgment affirmed.

Ex parte Darling.

EX PARTE DARLING.

(16 Nev. 98.)

Constitutional law — commutation of sentence for good behavior — retrospective effect.

A statute granting a deduction from the term of sentence of convicts for good behavior, is void as to sentences imposed before the statute takes effect.

HABEAS CORPUS. The opinion states the case.

M. A. Murphy, attorney-general, for State.

HAWLEY, J. Petitioner is held in confinement in the State prison under a commitment, issued on the sixteenth day of November, 1872, ordering him to be imprisoned for the term of ten years. He claims that he is entitled to his discharge under the amended act "for the government of the State prison" approved March 1, 1881, which provides that every convict faithfully performing such labor as may be required of him by the rules and regulations of the prison "shall be allowed from his term, instead and in lieu of the commutation heretofore allowed by law, a deduction of two months in each of the first two years, three months in each of the next two years, and four months in each of the remaining years of said term." Stats. 1881, 109.

The act is in terms retroactive. It was evidently intended by the legislature to apply to cases before, as well as after, the first day of April, 1881, when the act takes effect. This is made clear by the language of the proviso: "That of those prisoners entitled to their discharge at the date of the passage of this act, by virtue of the provisions hereof, not more than one shall be discharged on any one day." Is this portion of the act constitutional? Does it not interfere with the judiciary? The Constitution divides the powers of the government of this State into three separate departments; the legislative, executive, and judicial. It declares in clear and explicit terms, that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Const., art. 3.

The judicial power of this State is vested in the courts. The trial, conviction and sentence of prisoners who have violated the laws of this State are well-known judicial duties. Neither the legislative nor the executive department can interfere with the courts in the exercise of these or other duties which pertain exclusively to the judicial department.

Section 21 of article 5 of the Constitution, creating a board of State prison commissioners, and giving to it "such supervision of all matters connected with the State prison as may be provided by law," does not direct or permit the legislature, under the pretense of regulating the discipline of the prison, to wipe out and destroy the previous sentences, or any portion thereof, imposed upon the prisoners by the courts. The legislature can only pass such acts as are authorized by the Constitution. It cannot infringe upon any of its provisions.

It may be admitted for the sake of the argument, that the act was framed and beneficially designed to improve the discipline of the prison, and that it would, if allowed to be carried into effect, produce that happy result. If so, this argument might have had some force with the framers of the Constitution had it then been presented, but is not entitled to any weight with us if the Constitution is, as we think it is, clear and explicit. We have only to deal with the question of power. We have nothing to do with the wisdom or expediency of the statute. We are of opinion that the act in question, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void, because it interferes with the judiciary.

A similar law was declared unconstitutional by the Supreme Court of Pennsylvania, and for the same reasons. The court, in passing upon this question, said: "The whole judicial power of the Commonwealth is vested in courts. Not a fragment of it belongs to the legislature. The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can it be reversed or modified by a board of prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From what judicial sentence may not the legislature direct 'deductions' to be made if this act be constitutional? What they may do indirectly

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they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?

“It is to be observed that these questions have no reference to the power of the legislature to prescribe a general rule of law that shall be inconsistent with a previous judicial decree. Such a rule, when it operates on future cases and not retrospectively, is quite legitimate. Their power to legislate in that manner is not to be doubted. But under the act in question the good conduct of a particular individual, under judicial sentence, is to work out for him an abatement of a part of his sentence. In respect to one of the relators who was convicted and sentenced before the law was passed, it is considered very clear that it is a *legislative impairing of an existing legal judgment.*” *Commonwealth v. Halloway*, 42 Penn. St. 448.

The prisoner is remanded into custody.

Judgment reversed.

BELKNAP, J., did not participate in this decision.

 STRAIT V. BROWN.

(16 Nev. 317.)

Water and water-course — diverting spring — percolation.

One may not divert a spring on his land to the injury of a prior appropriator to whom the water naturally comes through a creek by percolation from the spring.

SUIT to establish right to water. The opinion states the case. The defendants had judgment below

R. M. Clarke, for appellants.

C. J. Lansing, for respondents.

BELKNAP, J. This is a suit in equity to establish the right of the plaintiff to the waters of Duckwater creek. The sources of

this creek are springs, known as the "Warm springs," the waters of which, after running a short distance through a natural surface channel, are discharged into a large slough. This slough has no natural surface outlet. Its westerly border consists of concretionary limestone, formed by the waters, and this formation extends to the defined surface channel of the creek, a distance of about half a mile. The land thereby embraced is a portion of the unoccupied public domain, and is unfitted for agricultural or other purposes. Its surface gradually slopes from the lake to the creek. The waters of the creek were appropriated by the plaintiffs during the years 1867, 1868 and 1869, for the purpose of irrigating their farming lands adjacent thereto, and ever since then plaintiffs have used the waters for the purpose of their appropriations, except when deprived thereof by the acts of the defendants hereinafter stated.

In the year 1875, the defendants, in order to obtain water for the purpose of irrigating their lands, which are so situated that they can not be irrigated by waters from the creek, diverted the waters of the Warm springs for this purpose. The principal object of this suit is to restrain defendants from diverting these waters.

The court, before whom the cause was tried, was assisted in the determination of the questions of fact involved, by a jury to whom certain interrogatories were submitted. The court adopted the answers of the jury to the interrogatories, and in connection therewith made further findings of facts. Many of the interrogatories submitted to the jury, as well as the findings made by the court, were addressed to the question of the mode by which the waters of the springs reach the creek. Upon this subject there is a conflict in the findings. For instance: The following interrogatory was submitted to the jury: "Is there any subterranean stream or percolation of water from Warm springs to Duckwater creek?" To which the jury responded, "No." Afterward they answered, "Yes," to the following interrogatory: "Do the waters of the Warm springs connect with Duckwater creek and furnish part of the waters usually flowing therein by subterranean channels?" But throwing out of view the question of conflict in the findings, and considering all of them together, we think we are justified in assuming that at an indefinite time the waters of the springs flowed through a natural surface channel to the creek; that the calcareous properties of the waters of the springs have formed a light, porous limestone, by which the natural channel from the slough to the

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creek has been closed, and that by some subterranean means, which do not appear to have been satisfactorily established to the court or jury, the waters of the springs find their way to the creek. There is no conflict with the finding that the springs are the source of the creek, and that the diversion of the defendants appreciably diminishes the volume of water naturally flowing in the creek. Upon these facts the District Court rendered judgment in favor of defendants.

No question of riparian proprietorship arises in this case. Both parties claim by virtue of appropriations of the waters. The doctrine of appropriation of surface waters, as established in the Pacific States, is conceded by respondent. This doctrine declares that prior appropriation gives the better right to running water upon the public lands to the extent of the appropriations. If this law, as thus established, is applicable to the facts of this case, the judgment must be reversed.

Counsel for respondents contend that the judgment should be sustained, because there is no known or defined channel through which the waters of the springs reach the creek; that if these waters at all reach the creek, they do so by percolation or other unknown means, and that to such cases the law of water-courses does not apply.

It has been conclusively established by a long line of decisions that percolating water existing in the earth is not governed by the same laws that have been established for running streams. No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions. The grounds for the distinctions are clearly pointed out in the authorities.

The subject was carefully considered in the case of *Chatfield v. Wilson*, 28 Vt. 54. The court there said: "The secret, changeable and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be seen and known, and is uniform. They are not in the earth and a part of it, and no se-

cret influences move them, but they assume a distinct character from that of the earth, and become subject to a certain law — the great law of gravitation.”

There is then no difficulty in recognizing a right to the use of water flowing in a stream as private property, and regulating that use by settled principles of law.

We think the practical “uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.”

In *Haldeman v. Bruckhart*, 45 Penn. St. 519, upon this subject the court said : “In case of an underground supply to a spring or well, or a stream emerging upon land of a lower proprietor, the water does not flow openly in the sight of the owner of the soil under which it passes, there is therefore no reason for implying consent or agreement between the proprietors of the adjoining lands beneath which underground currents exist, which is one of the foundations upon which the law as to surface streams is supposed to be built ; and for the same reason no trace of positive law can be inferred. Again, if the lower proprietor has a right to the undisturbed flowage of water through subterranean passages in his neighbor's land, he has the power of preventing that neighbor from using the water on his own soil, for he cannot use it and return it to its old passage-way, which he may do in the case of a surface stream. Such a right, if it exists, also exposes the upper proprietor to the hazard of incurring fruitlessly heavy expenditures in efforts to improve or use his land, since he can have no knowledge, until after his outlay is made, that his contemplated use will interfere with any rights or interests of an adjoining owner. A surface stream cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself or that other can have any knowledge. No such right can be supposed to have been taken into consideration when either the upper or lower tract was purchased. The purchaser of lands on which there are unknown sub-surface currents, must buy in ignorance of

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any obstacle to the full enjoyment of his purchase indefinitely downward, and the purchaser of land upon which a spring rises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land. It would seem therefore most unreasonable that the latter should have a right to prevent his neighbor from enjoying his own land in the ordinary way, either by digging wells, cellars, drains, or by quarrying and mining."

Because of these reasons courts have treated percolating waters as part of the soil, and upon the principle that the owner has the land, even to the sky and to the lowest depths, have permitted him to dig as deep and build as high as he pleased.

Accordingly in *Mosier v. Caldwell*, 7 Nev. 363, a case involving the rights of adjoining owners of land to water percolating through the soil, this court followed the general current of authority. In that case plaintiffs appropriated the waters of a spring upon their own lands. Afterward the defendants, owning adjoining lands, dug a well thereon. The excavation caused the spring to dry up, but there was no visible connection between the spring and the well, the flow of water being by percolation. It was held that the damage done by defendants sinking their well was not the subject of legal redress.

We fail however to appreciate the force of the argument that undertakes to make the law of percolating waters applicable to the facts of the case under consideration. One of the defendants, it is true, is the owner of the land upon which the Warm springs are situated, and it is also true, as a general principle, that the owner of land in its proper enjoyment may cut off or divert with impunity the water percolating through his soil; but the difficulty of defendants' position is that they have not been sued for diverting percolating waters. It is not charged that in digging drains, sinking wells, or working mines, or otherwise improving their property, they have interfered with waters percolating through the earth, as was the fact in the cases to which we have been referred. On the contrary, they have gone to the source of the creek and diverted living surface waters.

To these waters plaintiffs had acquired a prior right by virtue of an earlier appropriation. But because in passing from the springs to the creek the waters either percolate through the earth or are

conveyed by unknown subterranean channels, it is urged that the law relating to percolating waters should be applied.

It seems clear that none of the reasons upon which the law of percolating water is based exist in this case. Here there is no uncertainty, either as to the existence of the water or the amount of water which defendants have taken from plaintiffs. Nor is it reasonable to suppose that defendants could have been ignorant of the effect which their diversion of the waters would produce upon the plaintiffs lower down the creek. It may fairly be assumed that plaintiffs acquired their lands from the fact that the waters of the creek could be made available for irrigation; and having appropriated the waters prior to the appropriation made by defendants, such prior appropriation should be protected.

It would be a mere pretense of protection of the rights acquired by the earlier appropriators of the waters of the creek to say that later appropriators could lawfully acquire rights to the springs which constitute the source of the creek, simply because the means by which the waters are conveyed from spring to creek are subterranean and not well understood. For these reasons we are of the opinion that the judgment is against law and should be reversed. As there may be a retrial of the case we consider it advisable to add that under the facts established, plaintiffs were entitled in their pleadings and evidence to treat the waters of the springs as a part of the creek.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BRUMMER V. COHN.

(86 N. Y. 11.)

Insurance — Life — husband for wife — "endowment" policy.

Under the statute permitting a wife to insure her husband's life for her benefit, he paying the premiums, and to hold the proceeds as against his creditors, the insurance may be on the "endowment" plan.

ACTION for a re-assignment of a policy of life insurance. The head note and opinion show the facts. The plaintiff had judgment below.

Julien T. Davies, for appellant.

A. Blumensteil, for respondent.

ANDREWS, J. [Omitting other matter.] It is claimed that the policy in question is not within the act of 1840, and is not therefore subject to the rule of non-assignability established in *Eadie v. Slummon*, 26 N. Y. 9, for the reason that it is an endowment policy—that is, a contract by the insurer, in the alternative, in consideration

of the payment by the insured of an annual premium, to pay the sum insured at the expiration of a term of years, or on the death of the husband, at any earlier period. The husband insured by the policy in this case is still living, and the period has not arrived when the obligation of the insurer to pay has become absolute; and it is insisted that the assignment of the wife sought to be annulled in this action was valid, so far at least as to convey her contingent interest, in the event of the husband surviving the time when the policy becomes payable. This contention is based on the claim that only contracts for life insurance strictly—that is, insurance payable in the event of death, are within the purview of the act of 1840, and that the reason assigned in *Eadie v. Slimmon*, for holding that policies of life insurance payable to wives are non-assignable, viz.: that the legislature had in view the protection of widows and orphans, which would or might be frustrated, if a wife was permitted to assign the policy during her husband's life, has no application to the endowment feature of a life policy, which contemplates the maturity of the contract during the husband's life. There is considerable force in the argument that an endowment policy was not in the mind of the legislature when the act of 1840 was passed. The original act provides that a married woman may cause her husband's life to be insured for her use, "for any definite period or for the term of his natural life;" and further provides that the insurance shall be payable to her "in case of her surviving her husband," and refers to no other event upon the happening of which she is entitled to receive it. It seems reasonable therefore to suppose that the words "any definite period" in the original section, referred to an insurance for a limited period, but nevertheless to an insurance payable only in the event of death. This construction justifies the remark of DENIO, J., in *Eadie v. Slimmon*, that the statute "looked to a provision for a state of widowhood and for orphaned children." The policy in that case was issued in 1852. But the act of 1840 was amended by chapter 656 of the Laws of 1866, by striking out the words in the first section of the original act, which made the insurance payable to the wife "in case of her surviving her husband," and inserting in their place the words, "in case of her surviving such period or term." This amendment seems to have been intended to bring within the act insurances of the precise character of the one in question.

An endowment policy is an insurance into which enters the ele-

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ment of life. In one aspect, it is a contract payable in the event of a continuance of life ; in the other, in the event of death before the period specified. The amendment of 1866 entitles the wife to the insurance, whenever she survives the period or term of insurance, and her right is not limited, as in the act of 1840, alone upon the event of her surviving her husband, and seems to contemplate as well the case of an insurance payable before the death of the husband, as one payable on his death.

[Omitting other matter.]

We think the judgment is right and should be affirmed.

Judgment affirmed.

All concur.

VAN VOORHIS V. BRINTNALL.

(86 N. Y. 18.)

Marriage — divorce — remarriage in another State — statute.

A marriage between E. and B. was dissolved in New York on the ground of B.'s adultery, and B. was forbidden to remarry during E.'s lifetime, in accordance with the statute declaring such remarriages void. Afterward and during E.'s life B. went with I., a resident of this State, to Connecticut, and there married I., returning the same day to New York and thereafter living in New York. The marriage in Connecticut was valid there, but was resorted to for the purpose of evading the prohibition in the decree of divorce. *Held*, that a child of B. and I., subsequently born in New York, was legitimate.*

ACTION for construction of a will. The opinion states the facts. Cross appeals.

George W. Stephens and D. M. Porter, for appellants.

Richard Busted, Jr., for respondents.

DANFORTH, J. By this action the plaintiffs seek a construction of the will of Elias W. Van Voorhis, deceased, and an adjudication as to the right under it of the defendant, Rose Van Voorhis. The questions turn upon these facts. The testator died in 1869, leaving a widow and three children, Elias, Sarah and Barker. The

* Followed in *Moore v. Heyman*, 27 Hun. 60.

widow and Elias were appointed executors. By the will a specific devise was made to his wife, and the residue of the estate given to the executors in trust, "so long as his wife should live," for the accumulation of income and payment by them as therein directed. By its second clause two-ninths parts of this income was to be paid for the benefit of Barker, as follows: Four hundred dollars annually for the support of Ella Van Voorhis, and the same amount for the support of Elias William Van Voorhis, children of Barker, until they should respectively reach the age of twenty-one years, the remainder or said two-ninths to Barker. Before the commencement of this action Ella reached the age of twenty-one years. The sixth clause of the will provided that upon the death of the testator's wife all his property should be divided equally between his children above named, share and share alike, and the issue of any deceased child should take the share his, her or their parent would have taken if then living. Elizabeth was then the wife of Barker and mother of Ella and Elias, his children. Afterward and on the 19th of April, 1872, in consequence of proceedings begun by her, the Supreme Court of this State dissolved the marriage of Elizabeth and Barker, on the ground of his adultery, and also adjudged that it should not be lawful for him to marry again until her death. That event has not happened, but on the 10th of June, 1874, he married Ida L. Baron Schroeder at the city of New Haven, in the State of Connecticut. Both parties then resided in this State, and the trial court found as a fact "that they went to New Haven for the purpose of evading the New York law, for the reason that the said Barker Van Voorhis was prohibited from marrying again in this State." On the same day they returned to New York and continued to reside there until the death of Barker in 1880. Defendant Rose Van Voorhis was a child of that marriage, born in this State, April 2, 1875. The trial court also found that the marriage was valid under the laws of Connecticut, but from the facts above stated, that it was null and void by the laws of this State. Rose therefore was adjudged illegitimate and not entitled to take under the will. It was also declared that the two-ninths of the income appropriated for the benefit of Barker (after deducting \$400 annually during the minority of Elias) were undisposed of and went by force of the statute of distributions to Elizabeth, his former wife, and her children. The plaintiffs, and Rose Van Voorhis and Sarah Brintnall, defendants, appealed to the General Term of the Supreme

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Court, where the judgment was affirmed. They now appeal to this court.

The plaintiffs and the defendant Sarah Brintnall object to so much of the judgment as disposes of the income set apart by the second clause of the will. They insist that Elizabeth, the former wife of Barker, has no concern with it. On the contrary, they say it should go to the testator's son Elias, and Sarah, his daughter, each taking one-third, and the remaining third to the children of Barker. This question was not presented by the complaint as one concerning which the executors had any doubt, and they now claim that it was by inadvertence passed upon by the trial court. It would seem therefore that the attention of that court should have been called to it in some other way than by exception and appeal. As the case stands there is such a defect of parties as would make unavailing our decision if it should accord with the plaintiff's views. Elizabeth, the mother, is not before us and would yet have a right to be heard. Whether one released without fault on her part from the obligations of marriage may, upon the death of her former husband, have a share of his personal estate, and if so, whether it is to be measured by its condition at the time of the divorce or at his death, should not be determined in her absence. Our conclusion however upon the remaining question will lead to a new trial ; and in the meantime such steps can be taken as the parties think fit to complete the record.

That question involves the civil status acquired by Barker Van Voorhis and Ida by the marriage in Connecticut. First, it is a general rule of law that a contract entered into in another State or country, if valid according to the law of that place, is valid everywhere (*King of Spain v. Machado*, 4 Russ. 225 ; *Potter v. Brown*, 5 East, 130 ; *Story's Confl. of Laws*, § 242) ; and this, says Kent (2 Com. 454), "is *jure gentium* and by tacit assent," and Lord BROUGHAM in *Warrender v. Warrender*, 2 Cl. & Fin. 529, 530, declares that the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitati*, but *ex debito justitiæ*. And coming to the case in hand, the rule recognizes as valid a marriage considered valid in the place where celebrated. *Story's Confl. of Laws*, §§ 69, 79 ; *Connelly v. Connelly*, 2 Eng. L. & Eq. 570. "We all know," say the court in that case, "that in questions of marriage contract, the *lex loci contractus* is that which is to determine the *status* of the parties,"

and also declare that this by consent of all nations is *jus gentium*. In *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, it was held that a marriage, good in Scotland, though otherwise by the law of England, is valid in that country; and this was put upon the ground that the rights of the parties must be tried by reference to the law of the country where they originated. In *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395, the same principle is stated in different words. The court say, "All parties contracting gain a forum in the place where the contract is entered into." *Warrender v. Warrender*, *supra*; *Lacon v. Higgins*, 1 Dow. & Ry. 38; *Butler v. Freeman*, 1 Amb. 303. Not only is this the result of English decisions, but is believed to state the principle upon which the courts of many of our sister States have acted (*Greenwood v. Curtis*, 6 Mass. 358 (4 Am. Dec. 145); *Medway v. Needham*, 16 Mass. 157 (8 Am. Dec. 131); *Parton v. Hervey*, 1 Gray, 119; *Putnam v. Putnam*, 8 Pick. 433; *Dickson v. Dickson*, 1 Yerg. 110 (24 Am. Dec. 444); *Stevenson v. Gray*, 17 B. Monr. 193; *Fornshill v. Murray*, 1 Bland. Ch. 479 (18 Am. Dec. 344); and by which our own, with few exceptions, have been governed. In *Decouche v. Savetier*, 3 Johns. Ch. 210 (8 Am. Dec. 478), Chancellor KENT says: "There is no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci*." In *Cropsey v. Ogden*, 11 N. Y. 228, JOHNSON, J., says, p. 236: "By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated." The court had before it the case of one who, having a former wife living, from whom he then had been divorced for adultery by him committed, married a second time in this State. His last marriage was held to be void under our statute prohibiting a second or other subsequent marriage of any person "during the life-time of any former husband or wife of such person." There the former marriage, his adultery, and the existence of his first wife established the condition or quality of the man. They were facts in his history, and brought him within the terms of our law. The general rule above stated was applied. The *lex loci* governed. But the court said it was not necessary for them to consider what would have been the effect of a marriage celebrated out of this State. Its attention was however directly brought to the statute relating to marriages, and the circumstances under which the remarks above quoted, and others seeming to discriminate between a marriage in this State and

out of it, were made, render them the more significant. In *Haviland v. Hulstead*, 34 N. Y. 643, a person divorced for the same offense in this State promised in New Jersey to marry the plaintiff. He married another, and an action for the breach of this promise was brought here and failed. The parties resided in this State and contemplated the performance of the contract here. The court carefully distinguish the case so presented from one where a marriage had taken place in a foreign State. They assume that the latter would be treated as valid, although the parties had gone there with intent to evade the laws of this State, and citing *Medway v. Needham*, *supra*, say the doctrine "in favor of marriage so contracted is founded on principles of policy, to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live." Indeed the general doctrine is so well settled by the decisions of all courts and the reiteration of text writers as to become a maxim in the law, that one rule in these cases should be followed by all countries; that is the law of the country where the contract is made. Story, *supra*, 84; 2 Kent Com. 91-92. There are no doubt exceptions to this rule; cases, first, of incest or polygamy coming within the prohibitions of natural law (*Wightman v. Wightman*, 4 Johns. Ch. 343; *Hutchins v. Kimmell*, 31 Mich. 133; s. c., 18 Am. Rep. 164; Story, *supra*, § 113 a [7th ed.]); second, of prohibition by positive law. It is contended by the learned counsel for the respondent that the judgment may be upheld upon the ground that the marriage is one of the latter class. The assertion however is left unsupported by argument or the citation of authorities. Its truth is not so self-evident as to dispense with either, and the omission, coupled with our own examination, leads us to think that the courts have not yet spoken with a controlling voice in its favor. It is to be maintained, if at all, upon the prohibition in the judgment of divorce already referred to, and the provisions of the statute which made the judgment proper. *Graves v. Graves*, 2 Paige, 62. The question is not one of ethics or morality, but the extent of the authority of the statute as a rule of conduct. As a direct inquiry it is here for the first time. There are *dicta* and expressions having relation to it in *Cropsey v. Ogden*, and *Haviland v. Hulstead*, *supra*, tending to confine the effect of the statutory prohibition and declaration of invalidity to second marriages within this State; but in neither

case was the precise question before the court for judgment. In other courts of this State it has met with differing answers. In the Supreme Court, first department, *Marshall v. Marshall*, 2 Hun, 238, by a divided court, and *Thorpe v. Thorpe*, Superior Court of New York city, following it, a marriage under similar circumstances was held void. The judgment now before us went upon the principle of *stare decisis*, the court below also following *Marshall v. Marshall*, *supra*; *Kerrison v. Kerrison*, Special Term, fourth department, 8 Abb. N. C. 444, and *Matter of Webb*, 1 Tucker, 372 (Surr. Ct.) are to the contrary. To the latter class may be added *Ponsford v. Johnson*, before NELSON and BETTS, JJ., 2 Blatchf. 51. These decisions are irreconcilable, and any determination reached by us must overrule one class or the other. We are therefore at liberty to treat the subject as *res integra*, unaffected by any paramount authority, although greatly assisted by the reasoning of the learned judges who have taken part in those judgments.

The statutory provisions relied upon by the respondent are found in part 2, chap. 8 of the R. S., entitled "Of the domestic relations," and especially in those articles which treat "of husband and wife." Tit. 1, arts. 1 to 5, vol. 2, p. 138. The statute does not define marriage or introduce a new formula for the relation, but treats it as existing, and declares it shall continue "in this State" a civil contract (§ 1, chap. 8, tit. 1, art. 1, part 2), adopts the principles of the common law which renders invalid marriages between persons connected by certain lines of consanguinity (§ 3, *id.*) or who for want of age or understanding are incapable of consent, or who if capable have been induced to give it by fraud or force. § 4, *id.* It then declares that no second marriage shall be contracted by any person during the life-time of any former husband or wife of such person, unless the marriage with such former husband or wife shall have been dissolved for some cause other than the adultery of such person, and that every marriage contracted contrary to this provision shall be absolutely void. § 5, *id.* These circumstances are restated as grounds of divorce, and it is enacted that "whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the life-time of the defendant, but no defendant convicted of adultery shall marry again until the death of the complainant." § 49, *id.* art. 3. As originally enacted the same statute tit. 1, *supra*, § 2, not only made the consent of parties essential, but limited the class to those "capable in

law of contracting," and by its definition excluded males under seventeen and females under fourteen years of age. Although this provision has been repealed, it throws some light upon the legislative intent in devising the system of laws concerning husband and wife. Conditions were annexed not only to the duration, but the creation of this relation, and the frequency with which it might be formed. Certain persons are declared capable, others incapable of forming it, and still others must submit to its dissolution. In one instance, as in the case before us, it cannot be contracted with another while the first co-contractor is living. It is obvious that this last condition is in the nature of a penalty. *Wait v. Wait*, 4 N. Y. 101; *Com. v. Lane*, 113 Mass. 471; s. c., 18 Am. Rep. 509. It forms no part of the relief sought by the injured party, has no tendency toward compensation, nor is it imposed to that end. It is restraint or punishment. *West Cambridge v. Lexington*, 1 Pick. 506-508 (11 Am. Dec. 231); *Clark v. Clark*, 8 Cush. 386. The fact of adultery is in the language of the statute an "offense," the person committing it "a guilty person;" and when established by judgment he is said to be "convicted." He is, in consequence of it, deprived of a natural right or privilege which others enjoy. Moreover for violating this statutory provision he is at least rendered liable to fine and imprisonment, as for a misdemeanor (2 R. S., part 4, chap. 1, tit. 6, p. 696, §§ 39, 40); if not for felony under the provisions of article 2 of the same statute. 2 R. S. 687. The opinion of WALWORTH, chancellor, went to that extent in *Graves v. Graves*, 2 Paige, 62; and although *People v. Hovey*, 5 Barb. 121, is to the contrary, the measure of the offense is not now important, and the last case holds to the misdemeanor. To that extent the law is plain. The real question is whether such a statute furnishes an exception to the maxim "*Leges extra territorium non obligant*." It is not necessary to assert that the power of the legislature is so limited that no law passed by it would accompany a citizen into other countries and there control or modify the legal effect of his actions. Nor need we deny that it might be so framed as to affect his person and subject him in this State to punishment for its violation elsewhere, upon his return to the jurisdiction of our courts. On the contrary, it is to be regarded as settled law that as all persons within its borders, whether citizens or aliens, are liable to be punished for any offense committed in this State against its laws, its citizens may also be punished for acts committed beyond its borders where

there is a special provision of law declaring the act to be an offense, although committed out of the State. Maxwell on Stat. 119-128; *Cope v. Doherty*, 2 De G. & J. 624; 1 Burge's Col. & For. Laws, 196. So also may an act committed out of the State be made to affect an individual, whether citizen or foreigner, when he comes within its borders and does some other act of which our laws take notice. Nor are examples of legislation effecting these results wanting. The statute defining acts which constitute treason, tit. 1, pt. 4, ch. 1, p. 657, vol. 2 R. S., § 2, illustrates the first: It subjects the offender to punishment, whether the act prohibited is done "in this State or elsewhere." That against duelling is an example of the second: It makes one who by previous engagement fights a duel without the jurisdiction of this State, and in so doing inflicts a wound upon any person, "whereof he shall die within this State," and every second engaged in such duel, guilty of murder within this State. And still more in point, as illustrating its manner of expression where the legislature intends to take cognizance of an act committed outside the limits of the State, or to impress upon the *status* of its citizens a condition of liability for such an act, are the provisions of the statute treating of offenses against "the public peace and public morals." Tit. 5, pt. 4, ch. 1, art. 1, vol. 2, R. S. After providing punishment for fighting duels, sending challenges, etc., in the most general terms, excluding no one from its condemnation, but within the general maxim above quoted having no extra-territorial force, comes a provision which by its special language attaches to the citizen, goes with him as he crosses the line of his State, and binds him with an obligation in what place soever he is. "If," it says, § 5, id., "any inhabitant of this State shall leave the same for the purpose of eluding the operation" of these provisions, and "shall give or receive any such challenge" * * * without this State, he shall be deemed guilty and subject to the like punishment as if the offense had been committed within this State." And we shall see later a provision similar to this, now forming part of the law relating to marriages in the State of Massachusetts. Another instance well shows by contrast the necessity of a declaration that the arm of the law shall be so extended. In proximity to the provisions I have quoted, in the next article, § 8, is the statute "of unlawful marriages," defining bigamy and declaring its punishment; saying in general terms, "every person having a husband or wife living who shall marry any

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other person" (with exceptions of no moment here) shall be adjudged guilty of bigamy, providing, § 10, that "an indictment may be found against any person for a second, third or other marriage herein prohibited, in the county in which he shall be apprehended, and the same proceedings had thereon as if the offense had been committed therein." Yet there are no enlarging words affixing themselves to the person of the citizen as in the statute before quoted, or bringing within its purview "a second or other marriage" contracted out of the State. And therefore on the trial of one who was indicted for bigamy, the second marriage having taken place in Canada, it was held, as early as 1855, by a court presided over by the late Judge W. F. ALLEN, then a justice of the Supreme Court, that this statute had no application, that the second marriage was not an offense against the laws of this State, because they had no "extra-territorial force." *People v. Mosher*, 2 Par. Cr. 195. In like manner, if Barker Van Voorhis had on his return to this State, after accomplishing his second marriage, been indicted under the statutes to which I have referred, either for bigamy or for doing a prohibited act, it would necessarily follow that the indictment would fail. Yet the words of the statute are general; in themselves they contain no limitation. But we have been referred to no case, and I think none can be found, where such general words have been interpreted so as to extend the action of a statute beyond the territorial authority of the legislature; and it is only by extending it that our courts can take cognizance of acts there committed. Of the third class, an example is afforded by our statute defining punishment for a second offense, § 8, p. 699, vol. 2, R. S., pt. 4, ch. 1, tit. 7. "If any person," it says, convicted of any offense punishable by imprisonment, etc., shall afterward be convicted of any offense, he shall be punished in a mode prescribed. It is evident that these words are general and taken literally would apply to "any person" committing an offense in or out of the State. Applying the mode of construction contended for by the respondent, nothing more would be necessary. But the legislature show that such is not its meaning. By section 10 they declare that "every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offense, which if committed within this State, would," etc., "shall upon conviction of any subsequent offense committed within this State be subject" to punishment in

the same manner and to the same extent "as if the first conviction had taken place in a court of this State." Thus by implication is expressed the opinion of the legislature that the general words of the eighth section, *supra*, would not meet the case provided for in the tenth section. In Massachusetts, after a statute extending the prohibition against a second marriage under circumstances before stated to inhabitants of that State going out of it to evade the law, it was held that if in any event the foreign marriage could be invalidated, it could not be without proof of the intent made necessary by statute. Nor without it could there be a conviction for polygamy. *Com. v. Lane*, 113 Mass. 458; s. c., 18 Am. Rep. 509. A similar distinction exists under the English law. In 1 Hale's P. C. 662, the case is stated of a woman who married in England and afterward married abroad during her husband's life. It was held she was not indictable under the statute of the former country for bigamy, for the offense was committed out of the kingdom, and the act did not in express terms extend its prohibition to subjects abroad. It is otherwise however in regard to certain offenses committed in other countries by Englishmen against their government, viz.: Murder and slave-trading, because the statutes have so provided. *Warrender v. Warrender*, *supra*. Now if the criminal court has no jurisdiction to punish the act when committed out of the State, how has the civil court jurisdiction to prohibit the doing of the act out of the State? The consequences are the same in either case, and are prescribed by the same statute. Whether a man is punished by fine and imprisonment, or by the disgrace of himself and the woman he married — the bastardy of his children — is a difference in degree only. The severer punishment is in the last alternative. Can the court imply the power to inflict it? Can it exist unless given by express language? I think not.

The statute does not in terms prohibit a second marriage in another State, and it should not be extended by construction. The mode of construction contended for by the respondent, if applied to the statutes of treason and duelling and the punishment of second offenses, would make useless those provisions which relate to the conduct of a citizen out of the State and the commission of crime in this State by one convicted in another State. Can they be disregarded, or the legislature charged with useless enactments? On the contrary, we must give weight and meaning to them; to their presence in those laws and their absence in

the one of marriages. The difference is essential, and the varying language cannot be disregarded. There is first a prohibition broad as in the act before us, wide enough to take in all persons within the State, and prohibiting certain acts — a personal prohibition. Not content with that, the statutes go further and extend the same consequences to those acts when committed out of the State. These provisions are lacking in the law before us. When therefore we consider the legislation of this State before referred to, and the general rules regulating the territorial force of statutes, we cannot but regard the omission to provide by law for cases like the present as intentional, but if not in the language of Lord ELLENBOROUGH, in *Rex v. Skone*, 6 East, 518, “we can only say of the legislature *quod voluit non dixit*.” This view is sustained by the course of decision and legislation in Massachusetts. In *Medway v. Needham*, *supra*, the plaintiff sued for the support of certain paupers — one Coffee and his wife — alleged to have their legal settlement with the defendant. The only question on the trial, or the subsequent hearing before the whole court, respected the validity of his marriage. He was a mulatto and his supposed wife a white woman. They were inhabitants and residents of Massachusetts at the time of their marriage, and the statement is that “as the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island and were there married according to the laws of that province,” and returned immediately to their home. Both courts held the marriage good. The statute regulating marriages in Massachusetts was at that time like our own, but the court placed their decision upon the general principle that a marriage good according to the laws of the country where it is entered into shall be valid in any other country, PARKER, C. J., saying: “This principle is considered so essential that even where it appears that the parties went into another State to evade the law of their own country, the marriage in the foreign State shall be valid in the country where the parties live;” and referring to the statute which declares second marriages absolutely void, says: “They are only void if contracted within this State.” *West Cambridge v. Lexington*, 1 Pick. 506 (11 Am. Dec. 231), involved the rights of infant children of Samuel Bemis, paupers, to public support in that State. The question turned upon the validity of his second marriage; the first had been dissolved for his adultery. Afterward and while his former wife was living, he married in New Hampshire,

and the children were from that union. The court held that if the marriage had been contracted in Massachusetts, it would be unlawful and void, but that the laws of no country have force outside of its own jurisdiction, and therefore one, who by reason of his offense against it is disabled from contracting another marriage, may lawfully marry again in a State where no such disability is attached to the offense; and further, having a right to marry there, he could not while there violate the statutes of Massachusetts against polygamy. It was therefore held that the children were legitimate, their settlement to be where that of their father was, and the town entitled to recover for their support. The circumstances of *Putnam v. Putnam*, 8 Pick. 433, are singularly like those before us; and it was held that although the second marriage was a clear case of evasion of the laws of the Commonwealth, it was valid upon the general rule referred to in the cases already cited. The court also say: "If it shall be found inconvenient or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another State, which if entered into here would be void, shall have no force within this Commonwealth." There is thus recognized a necessity discussed earlier in this opinion, for express legislation, if the citizen is to be held bound by the laws of his State for acts performed by him outside its limits. Legislation to this end was afterward had. Rev. Stat. of Mass., ch. 75, § 6; Gen. Stat., ch. 106, § 6. Referring to provisions of the act making void marriages between certain parties, or by persons in prescribed conditions or under certain circumstances, it declares, "where persons resident in this State, in order to evade the preceding provisions and with an intention of returning to reside in this State, go into another State or country and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this State." It is not necessary to consider the extent or scope of this statute. It has been discussed by the courts of that State, and it is said by DEWEY, J., in *Com. v. Hunt*, 4 Cush. 49, "to have been intended to meet this class of cases, that is, of individuals fraudulently attempting to evade the law of Massachusetts, so far as respects persons divorced for the crime of adultery, and to declare such marriages by the guilty party to be void in this Commonwealth;" or as HUBBARD, J., says, in *Sutton v. Warren*, 10 Metc. 453: "The only object of this provision is, as stated by the commissioners in their report, to enforce

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the observance of our own laws upon our own citizens, and not suffer them to violate regulations founded in a just regard to good morals and sound policy." We have no law in relation to this subject similar to that of Massachusetts or our statutes before cited in reference to duelling and treason. There is nothing in the statute to indicate an intention of the legislature to reach beyond the State to inflict a penalty. Nor can I discover an intent so to impress the citizen with the prohibition as to make an act, which is innocent and valid when performed, an offense when he returns to this State and himself a criminal for performing it. Every presumption is against such intention. The respondents rest their case upon the general words of the statute. These taken in their natural and usual sense would undoubtedly embrace the case of the appellant. "No second * * * marriage shall be contracted by any person during the life-time of any former wife of such person." "Every such marriage shall be absolutely void." "No defendant convicted of adultery shall marry again until the death of the complainant." Equally broad are the provisions of the criminal law declaring the punishment of the offender. They would comprehend every second marriage wherever celebrated, and take in the citizens of every State. It cannot be denied that they are subject to explanation and restraint. *Mosher v. People, supra*, and the principle on which it rests, shows the criminal law to have no application to a marriage out of the State. The same rule was applied in *Sims v. Sims*, 75 N. Y. 466, where after a very full discussion of the question involved, it was decided that the provision of the Revised Statutes, 2 R. S. 701, § 23, declaring a person sentenced upon a conviction for felony to be incompetent as a witness, does not apply to a conviction in another State; that it has reference only to a conviction in this State.* The conviction was in Ohio; it was assumed that the convict would have been incompetent as a witness in this State. Suppose a judgment here followed his evidence, and it was afterward prosecuted in Ohio. Would it be competent in defense to show that it was obtained upon evidence inadmissible by the laws of Ohio? Clearly not. And the reason is stated in the case cited: "The disqualification is in the nature of an additional penalty following and resulting from the conviction and cannot extend beyond the territorial limits of the State where judgment was pronounced." He was therefore a competent wit-

* See *Nat. Trust Co. v. Gleason*, 77 N. Y. 400; s. c., 33 Am. Rep. 632, and note. 639.

ness in the State of New York. There is in principle a close analogy between the case I have supposed and the one before us. In each there is a personal disqualification. In one, to marry; in the other, to testify. In neither case does the disqualification arise from any law of nature or of nations, but simply from positive law. Each deprives the offender of a civil right. Now in case of the witness, his testimony in New York results in a judgment, a contract of record, to which, when it reaches Ohio, full effect must be given, and for its enforcement the machinery of the law of that State put in motion. In the other case—that in hand—a contract is entered into by the offender, which is a good contract under the laws of the State where made. If so, it should also follow that to each party thereto and to their issue every right and privilege growing out of the relation so established must attach. When therefore they return to this State with the evidence of that contract, can the courts do more than in the other case? Are they not limited to the inquiry whether the contract was valid in the State where made? And if it was, how can they deny to the child its inheritance? Let me go a little further. Suppose on the day the decree of divorce was granted, Barker had also been convicted and sentenced for a felony. He would then have been subject not only to the statutes above cited, but to that other which declares “that no person sentenced upon a conviction for felony shall be competent to testify in any cause.” 2 R. S. 701, § 23. Disqualified therefore to marry or to testify, he does both in Connecticut, brings back to this State the judgment record and the marriage contract. If the first cannot be impeached because of his sentence, neither as it seems to me, can the other, because of his “conviction.” And for the same reason, viz.: that stated by Greenleaf as the result of the weight of modern opinion, sanctioned by this court in *Sims v. Sims*, *supra*, that personal disqualifications arising, not from the laws of nature, but from positive laws, especially such as are of a penal nature, are strictly territorial and cannot be enforced in any country other than that in which they originated. 1 Greenl. Ev., § 376.

Second. Nor are we, in the absence of express words to that effect, to infer that the legislature of this State intended its laws to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus*, and which is made binding by consent of all nations. It professedly

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and directly operates on all. To impugn it, is to impugn public policy. And while each country can regulate the status of its own citizens, until the will of the State finds clear and unmistakable expression that must be controlling. "Where," says MASHALL, C. J., *U. S. v. Fisher*, 2 Cr. 389, "rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

Our conclusion is, that as the marriage in question was valid in Connecticut, the appellant Rose Van Voorhis is a legitimate child of Barker, and as such entitled to share in the estate of the testator.

The judgment should be reversed and a new trial granted, without costs to the plaintiffs or Sarah A. Brintnall, but with costs to the appellant Rose Van Voorhis and the respondents Ella and Elias, to be paid out of the estate.

All concur, except FOLGER, C. J., not voting.

Judgment reversed.

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(38 N. Y. 140.)

Water and water-course — surface water — obstruction of.

The parties owned adjacent lots on a street. Surface water naturally and usually accumulated in the street in front of the plaintiff's lot, and sometimes ran off through a natural depression over defendant's lot and other low land to a river. Defendant built a house on his lot, filling in the lot and grading it up to the level of the sidewalk on the street, thereby cutting off the flow of the surface water and causing it sometimes to flow on plaintiff's lot and flood his cellar. *Held*, that no action would lie therefor.*

ACTION of damages for obstructing flow of surface water. The opinion states the facts. The plaintiff had judgment below.

C. E. Cuddeback, for appellant.

* See *O'Connor v. Fond du Lac, etc., Ry. Co.* (52 Wis. 526), 38 Am. Rep. 753; *Catro, etc., R. Co. v. Stevens* (73 Ind. 278), 38 Am. Rep. 139.

J. M. Allerton, for respondent.

ANDREWS, J. This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course, that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course, because in times of drought the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water. Ang. on Water-courses, § 4; *Luther v. Winnisimmet Co.*, 9 Cush. 171.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are, that the natural formation of the land was such that surface water from rains and melting snow would descend from different directions, and accumulate in the street in front of the plaintiff's lot, in varying quantities according to the nature of the seasons, sometimes extending quite back upon plaintiff's lot; that in times of unusual amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land across the defendant's lot, and thence over the lands of others, to the Neversink river; that when the amount of water was small, it would soak away in the ground; that in 1871 the defendant built a house on his lot, and used the earth excavated in digging the cellar, to improve and better the condition of his lot, by grading and filling up the lot and sidewalk in front of it, about twelve inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875 there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There was no natural water-course over the defendant's lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant or usual, but occa-

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sional only. There was no channel or stream, in the usual sense of those terms. In an undulating country there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hill-sides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions water-courses. Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this State. It was referred to by DENIO, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule, that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this court, although in none of them, it seems, was the question before the court for decision. *Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. Mayor*, 76 id. 60; s. c., 32 Am. Rep. 271. The question has been considered by courts in other States, and has been decided in different ways. In some, the doctrine of the civil law has been adopted as the rule of decision. By that law the right of drainage of surface waters, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; Domat (Cush. ed.), 616; Code Napoleon, art. 640; Code Louisiana, art. 656. The courts of Pennsylvania, Illinois, California and Louisiana, have adopted this rule, and it has been referred to with approval by

the courts of Ohio and Missouri. *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesemer*, id. 407; *Gillham v. Madison Co. R. Co.*, 49 Ill. 484; *Wormley v. Sanford*, 52 id. 158; *Ogburn v. Connor*, 46 Cal. 346; s. c., 13 Am. Rep. 213; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181. On the other hand, the courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin, have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water, falling on his land, discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs, or prevents the surface water from passing thereon from the premises above, to the injury of the upper proprietor. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 id. 106; *Bowlsby v. Spear*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 id. 656; *Swett v. Cutts*, 50 N. H. 439; s. c., 9 Am. Rep. 276. It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State, in respect to surface drainage. *Bentz v. Armstrong*, 8 W. & S. 40. And in *Livingston v. McDonald*, 21 Iowa, 160, the court, in an opinion by DILLON, J., after stating the civil law doctrine, say, that it may be doubted whether it will be adopted by the common-law courts of this country, so far as to preclude the lower owner from making in good faith improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states that the prevailing doctrine seems to be that if for the purposes of improving and cultivating his land, a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed on to the first mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. Washb. on Easements (2d ed.), 431.

Upon this state of the authorities we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by DENIO, C. J., in *Goodale v. Tuttle*, is the one best adapted to our condition, and accords with public policy, while at the same time it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law, which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which flows in it. But each owner is entitled by virtue of his ownership of the soil to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream, by owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert, or unreasonably obstruct the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice, and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which in civilized society the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual of the water in a natural water-course, or any unreasonable interruption in the flow. It is said that the same principle of following the order of nature should be applied between conterminous proprietors, in determining the right of mere surface drainage. But it is to be observed, that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land, and his right in the water of a natural water-course. In such water, before it leaves his land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it by drains or ditches upon the land of his neighbor ; and he may do this, although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mil-

owners or other proprietors on the stream. So also he may, by digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action. *Action v. Blundell*, 12 M. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nowlen*, 72 N. Y. 39; s. c., 28 Am. Rep. 93. Now in these cases there is an interference with natural laws. But those laws are to be construed in connection with social laws, and the laws of property. The interference in these cases with natural laws is justified, because the general law of society is that the owner of land has full dominion over what is above, upon or below the surface, and the owner, in doing the acts supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; s. c., 35 Am. Rep. 540; *Miller v. Laubach*, 47 Penn. St. 154. But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land, and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property. Of course in some cases the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will on the whole best subserve the public interests, and is most reasonable in practice? For the reasons stated, we think the rule of the civil law should not be adopted in this State. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots) are crossed by the depression. They

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must remain unimproved, if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands, than one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say, that there may not be cases, which owing to special conditions and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

Judgment affirmed.

All concur.

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(36 N. Y. 154.)

Criminal law — perjury — essentials of oath.

Where the prisoner handed to an officer, authorized to take and certify affidavits, an affidavit previously signed by him, and reciting that he had been duly sworn, and the officer affixed his own signature to the jurat without any words or formalities, *held*, that perjury could not be predicted of the transaction.

CONVICTION of perjury. The opinion states the point.

Rufus W. Peckham, for plaintiff in error. An oath requires some ceremony, some form of words to be used in calling God to witness as to the truth of the testimony about to be given. It cannot be taken in silence. 1 Phil. on Ev. [C. & H. and Edw. notes], 15, 17; 1 Greenl. on Ev., § 328; Tyler on Oaths, 15; 1 Best on Ev., §§ 56, 58 [American notes, by H. G. Wood]; 1 Stark. on Evidence, 23, 24; 3 Ins. 165; 3 Whart. Cr. Law, § 2205; *Tuttle v. People*, 36 N. Y. 431; *Campbell v. People*, 8 Wend. 636. Some outward form or ceremony is necessary in the administration of an oath. 2 Bish. Cr. Law, § 1018; *Ashburn v. State*, 15 Ga. 246; *State v. Trask*, 42 Vt. 152; 1 Allison's Cr. Law, 474; 1 Greenl. on Ev., § 371; 1 Stark. on Ev., § 23; 1 Phil. on Ev. [C. & H. and Edwards' notes], 17, 18; *Jackson v. State*, 1

Ind. 184; *State v. Norris*, 9 N. H. 96; 1 Best on Ev., §§ 162, 163 [American Notes, by H. G. Wood]; 3 Whart. Cr. Law, § 2205; 1 Arch. Cr. Pr. and Pl. 487, note [§ 3, title "Parol Evidence"]; 2 R. S. 407, § 82; *Maher v. State*, 3 Minn. 444; Code of Civil Proc., § 845. The nature of an oath, or its form or mode of administration, is not altered because the oath is made to a paper called an affidavit, and is administered by an officer who is authorized by law to administer an oath, and to certify to the fact that such oath has been administered. Bac. Abr., title "Affidavit;" *Case v. People*, 76 N. Y. 242, 245; *Haff v. Spicer*, 3 Cain. 190; *Jackson v. Virgil*, 3 Johns. 540; *Millius v. Shafer*, 3 Denio, 60; *People v. Sutherland*, 81 N. Y. 1, 8, 9; 1 Hale Pl. 34; 1 Arch. Cr. Pr. and Pl. 491, title Evidence, "Deaf and Dumb Persons;" *Cowley v. People*, 83 N. Y. 464; s. c., 38 Am. Rep. 464; *People v. Cook*, 8 N. Y. 67, 84. The court erred in submitting to the jury to find, from the evidence, whether there was an intent on the part of the prisoner to swear to the paper without any words being said by either party. *Rex v. Crossley*, 7 T. R. 315; Bac. Abr. title "Perjury," b.

D. Cady Herrick, for respondent. No particular form of oath is necessary. Whart. Cr. Ev. (8th ed.), § 354; *Rex v. Brodribb*, 6 C. & P. 571. An oath is valid and binding although irregularly administered. *People v. Cook*, 8 N. Y. 67; *Queen's case*, 2 B. & B. 284; 3 Strobb. 147. An affidavit is a written oath sworn to by the affiant. 81 N. Y. 1. Any bodily assent to the oath is a sufficient swearing. *State v. Norris*, 9 N. H. 96. Signing a written oath, which in terms describes the affiant as thus swearing, handing it to an officer qualified to administer oaths, the affiant having previously expressed his desire to be sworn, and the parties meeting together for that purpose, is giving an assent; and his subsequent use of it as an oath is a continuing assent to it. Opinion, WESTBROOK, J., in *People v. O'Reilly*, 19 Hun, 320. The question, as to whether the prisoner intended by his acts to have the commissioner understand that he swore to the affidavit, was properly left to the jury. *State v. Whittenhurst*, 2 Hawks, 458.

FINCH, J. The evidence on behalf of the prisoner tended to prove, that on the occasion of the alleged perjury no words passed between the officer and the accused, and what was done consisted only

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of the latter's signature to the jurat, which he thereupon handed to the officer who affixed his own name to the certificate in silence. The force of this evidence was weakened, if not entirely destroyed, by the charge of the court. The learned judge who presided at the trial, with great care and deliberation, laid down a rule for the guidance of the jury, which is now assailed as erroneous. He stated it first in the form of an abstract proposition, and then applied it to the facts of the case on trial. In making such application he said: "If O'Reilly delivered the bill and the affidavit to Kieley to have the same certified to by Kieley as sworn to before him, intending thereby to declare to said Kieley that by oath he intended to verify and did verify the statement subscribed by him, and the officer regarding him as so declaring on oath signs the certificate and jurat for the purpose of evidencing the verification, and then delivers it to the party in that form verified, and the party presents it in that form and shape to the board of supervisors for the purpose of procuring the audit of the bill, then I charge you that the oath has been duly and lawfully administered." The criticism to which this proposition is subjected by the argument at the bar is in substance, that any form of an oath is rendered unnecessary, and the intention to swear is put in the place of the oath actually administered and taken. The criticism is just, precisely so far as it is true. Some form of an oath has always been required, for the double reason that only by some unequivocal form could the sworn be distinguished from the unsworn averment, and the sanctions of religion add their solemn and binding force to the act. Pandects, xii, 2; 3 Coke's Inst. 165; 1 Phil. on Ev. 15; 1 Stark. on Ev. 23; Lord HARDWICKE, in *Omychund v. Barker*, 1 Atk. 21; Tyler on Oaths, 15; 1 Green. on Ev., §§ 328, 371; 1 Allison's Crim. Law, 474; 3 Whart. Cr. Law, § 2205; 2 Arch. Cr. Pl. 1723. While these sanctions have grown elastic, and gradually accommodated themselves to differences of creed and varieties of belief, so that as the Christian is sworn upon the Gospels, and invokes the Divine help to the truth of his testimony, the Jew also may be sworn upon the Pentateuch, the Quaker solemnly affirm without invoking the anger or aid of Deity, and the Gentoo kneel before his Brahmin priest with peculiar ceremonies, yet through all changes and under all forms the religious element has not been utterly destroyed. So lately as the case of *People v. Sutherland*, 81 N. Y. 8, the taking of an oath is described as burdening the con-

science. Some form of an oath would therefore seem to be essential. It is almost as difficult to conceive of an act of swearing without any form, as of a material substance having neither shape nor locality. The changes of form incident to the growth of nations and of commerce have been serious, but have not dispensed with a form entirely. These changes are recognized and crystallized in our statute. 3 R. S. (5th ed.) 692. The usual mode of administering oaths by the person who swears laying his hand upon and kissing the Gospels, is first recognized, and that form prescribed as the general rule, and except as afterward provided. § 114. Then follow the exceptions. There were persons who on the one hand were unwilling to invoke either the vengeance or the help of the Divine Being, and those who believed in Him without believing in the Gospels or even in the Bible at all. The statute therefore next permits an oath to be administered in this form: "You do swear in the presence of the ever-living God." § 115. The religious element is here preserved, since in the absence of imprecation or invocation, the oath is taken as in the presence of the Supreme Being. But there were those whose conscience would not permit them to swear at all. To meet that emergency, the statute allows as a form: "You do solemnly, sincerely and truly declare and affirm." § 116. Then follows provisions to meet the cases of persons who have peculiar forms which they recognize as obligatory, and believers in other than the Christian religion. Such persons may be sworn in their own manner, or according to the peculiar ceremonies of the religion which they profess. §§ 117, 118. There remained however the case of infidels and unbelievers. For them there could be no religious element in an oath and no sanctity behind it. At first the inevitable result followed of their exclusion from the witness stand. But such rule of exclusion was soon modified, so as to protect them against personal inquiry, and finally substantially abrogated by the constitutional provision rendering them no longer incompetent "on account of their opinions in matters of religious belief." But this is a rule which merely shuts the door on inquiry. It neither dispenses with some form of an oath, nor changes its inherent character. It assumes that the affiant recognizes the sacred and solemn nature of his obligation, and will permit neither inquiry nor contradiction. If there be something inconsistent in this mode of meeting the difficulty, the remedy must be applied elsewhere. But the statute goes one step further. It

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provides generally that a person sworn by any of the forms prescribed, "or in any form authorized by law," shall be deemed to have been lawfully sworn; and this court has held that any form adopted, if not objected to by the affiant, is deemed to have received his assent and renders him liable to the consequences of perjury as if the oath had been administered in strict conformity with the statute. *People v. Cook*, 8 N. Y. 84. A wide scope, a large liberty is thus given to the form of the oath, but some form remains essential. Something must be present to distinguish between the oath and the bare assertion. An act must be done, and clothed in such form as to characterize and evidence it.

It is argued that the charge of the court ignores this necessity, and puts in the place of the act of taking the oath and its administration by the officer, the intention of the one and the supposition of the other. That portion of the charge which we have quoted, and the statement of the rule made during the trial, seems to us fairly to justify the criticism. The only act referred to is the delivery of the bill and affidavit to the officer. If that is done for the purpose of getting the officer's certificate, and with the intention of declaring to him that the affiant does verify the statement he has subscribed, and the officer regards him as so declaring on oath, that followed by the certificate of the officer and the use of the affidavit is held to be sufficient. But we think the language cited does not by itself fairly represent the proposition presented to the jury, and should be construed in connection with other parts of the charge, which more fully explain its meaning. Thus construed, it rests upon something more than a mere intention, and does not ignore the necessity of an act of swearing and some form of the oath. The reasoning of the learned judge makes his meaning very plain. He relies upon the language of the jurat which the prisoner signed and handed to the officer. That language was as follows: "C. O'Reilly, being duly sworn, saith that the items of the within account are correct," etc.; and the argument is that these written and printed words handed to the officer were as effectual as if the accused had said in spoken words, "I swear that the items of the within account are correct," etc.; in other words, that an audible utterance is not essential, and the oath may be taken by the pen as well as by the tongue. The last proposition may possibly be true and not confined to cases of necessity, and yet the inquiry remains, and is the final and determining question in the case, whether the

mere delivery of these written words, signed by the accused, to the officer for his certificate, constitutes an oath taken, and is the sufficient equivalent of an express and present declaration that the affiant swears to the truth of his statement. If such be the fact, it is difficult to sustain our decision in *Case v. People*, 76 N. Y. 242. In that case the accused signed the jurat and sent it to the notary for his signature. The delivery to the officer was a delivery by Case, although effected through the agency of a third person. That fact cannot change or modify the principle as it affects the affiant. It might and would touch and influence the duty of the officer in giving his certificate. But the certificate is not the oath. It pre-supposes an oath already taken, of which fact it but furnishes the evidence. It is the written words, signed and consciously and purposely delivered to the officer, which work the result. It is that delivery which converts the previously unsworn words into a valid affidavit. How is the inherent character of the affiant's act in any wise changed, modified or altered by such delivery through an agent instead of in person? The difference suggested to us is, that in the latter case the officer and affiant do not meet, and the oath is not taken before, that is, in the presence of the officer. While that fact is mentioned in the opinion, it is not made the definite ground of the decision, which takes a much wider range, and goes upon the theory that no oath was taken at all. The fundamental difficulty, whether the affidavit be delivered in either mode, seems to us to be that the act of delivery is equivocal, and just as consistent with an intention not to swear, though appearing to have been sworn, as with an intention to assume the obligation of an oath; and this difficulty is intensified, when as in the present case, the language written and signed and delivered to the officer is not "I do hereby swear," or "do depose and say," but "being duly sworn, saith." The language recites an oath previously taken already administered. It confesses a past act, an obligation already assumed. It does not profess to be itself the act or obligation. Such a construction of it is strained and unnatural. It would be hard to find an officer who would understand, upon reading such phrase, that an oath had already been administered by himself, and his sole duty was to certify the fact in silence; and we are required to believe that officers have been daily administering a second and superfluous oath when a sufficient one was already before them in writing. We think the charge went too far, and

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are not ready to affirm the proposition advanced. To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes upon himself the obligation of an oath. The delivery in this case of the signed affidavit to the officer was not such an act, and was not made so by the intention of the one party or the supposition of the other.

For these reasons the judgment should be reversed and a new trial granted.

Judgment reversed.

All concur, except FOLGER, C. J. absent from argument.

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(86 N. Y. 246.)

Deed — covenant — easement — evidence.

Defendant deeded to plaintiff, with covenants of warranty and quiet enjoyment, a dwelling-house and lot, described by metes and bounds, "with the appurtenances." A bath-room and water-closet in the house discharged through pipes into a sewer on adjoining premises owned by A. It appeared by parol evidence that the plaintiff at the time of taking his deed knew of this connection, and the apparent privilege enhanced the price of the premises. The defendant had no right to use A.'s sewer, and the plaintiff was subsequently enjoined by A. from such use. *Held*, that no action would lie for breach of covenant. (*See note, p. 537.*)

ACTION for breach of covenant. The head-note and opinion show the facts. The plaintiff had judgment below.

R. A. Parmenter, for appellant.

Esak Cowen, for respondent.

MILLER, J. The deed from the defendant to the plaintiff conveyed the premises therein described by metes and bounds "with the appurtenances and all the estate, title and interest therein of the said party of the first part," and contained the following covenant: "And the said William Collins doth hereby covenant and agree to and with the said party of the second part, her heirs and assigns,

that the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, he will forever warrant and defend against any persons whomsoever, lawfully claiming the same or any part thereof."

The question to be determined is whether the right to use the sewer over the land of Albertson's, which was adjoining, was not a legal appurtenance to the premises within the meaning of the deed, and a failure of the plaintiff to enjoy such right by means of a paramount title was a breach of the covenant of enjoyment or of warranty contained in such deed. The language of the deed of itself does not convey to the plaintiff a right to use her premises in such manner as would create a nuisance upon the land of the adjoining proprietor. The words "with the appurtenances" cannot affect the rights of the parties or enlarge the scope of the deed, as the appurtenances would pass without such words, for it is a general rule that whatever is in use for the land as an incident or appurtenance is conveyed by the deed. *Huttemeier v. Albro*, 18 N. Y. 48. If the right of the defendant to use the adjoining land was an easement attached to, or constituting a part of the land, it was transferred by the deed. Such right did not exist however in fact, and therefore it could not and did not pass to the plaintiff. The position of the counsel for the plaintiff is, that taking into consideration all the facts, it was intended by the grantor to sell, and by the grantee to purchase, such a right, and therefore the covenant of warranty is a covenant to defend the grantee against any easement which at the time the deed was executed appeared to be appurtenant to the land. In other words, that the question is not what was actually conveyed, but what did the defendant agree to convey and undertake to defend? This may be, strictly speaking correct, but inasmuch as the grantor could not convey what did not belong to him or constitute a part of or an appurtenant to the land conveyed, and as it is manifest that the right to use the adjoining land for the purposes of the sewer belonged to another party, and not to the defendant, it is not apparent how this could be included within the terms of the conveyance without the use of language to that effect. The right to drain upon the adjoining land would, at least to some extent, involve a right to inflict a burden, which unless protected or provided for, might constitute a nuisance, and such a result cannot be accomplished without proof of the existence of the right claimed, or express words showing that it was the in-

tention of the grantor to confer it. And although an existing easement as a matter of legal right passes with the thing granted, yet where a grantor conveys without any interest or title whatever, an easement does not pass to the grantee. In such a case in order to bind the grantor there should be a recital or representation in the conveyance or a covenant that the grantor is the owner of such easement, which it would be fraudulent to permit him to gainsay or deny. *Sparrow v. Kingman*, 1 N. Y. 246; see also *Whitney v. Allaire*, id. 305. In the case considered the conveyance contained no language which declared or imported that the grantor intended to convey the right in question, and as it was not an easement necessarily attached to the land as an appurtenance, it is not apparent how any liability was incurred without a special covenant or warranty conferring the right to use the sewer upon Albertson's land for all purposes. If the defendant had been the owner of Albertson's lot at the time of the conveyance, there would be reason for claiming that he was liable; for in such case the doctrine of estoppel would apply, and the defendant would have no valid ground for complaint that the drainage which was provided for was continued upon his own land, and as he had imposed the burden upon the land adjoining for his own benefit, it would continue to be attached unless the right to subvert it was expressly reserved. The authorities fully recognize such a distinction. *Lampman v. Milks*, 21 N. Y. 505; *Le Roy v. Platt*, 4 Pai. 77; *Simmons v. Cloonan*, 47 N. Y. 3. The learned counsel for the respondent cites and relies upon the case of *Mott v. Palmer*, 1 N. Y. 564, as an authority which is decisive of the question considered. The plaintiff in that case, the grantee, was sued by a tenant of the grantor for the value of a rail fence which was upon the farm at the time of the sale, and a judgment recovered against him. In the action upon the covenant of seizin it was held that it was broken if the grantor at the time of the conveyance did not own such things affixed to the freehold as would pass to the grantee by a conveyance of the land itself, and the grantor was held liable upon the covenant. Although the rails were the personal property of the tenant, yet being on the farm as a fence, and the deed purporting to convey them, there was sufficient ground for holding that the fence was conveyed by the deed. Although not owned by the grantor he clearly attempted to and did convey it, and as it stood upon the land, it passed with the land by the deed. And here, it appears to me, lies the distinction between

the two cases, that in the one cited the rails were actually conveyed as an appurtenance and as a part of the land, while in the case at bar the right to drain is not included in the deed or in any way connected with the land itself. The case cited does not hold that an easement which would seem to be essential for the full enjoyment of the grant, but is not in fact an appurtenance belonging to the land, is included within the terms and covered by the covenant of warranty. While the grantor may by the language of the deed warrant what does not belong to or constitute a part of the land, in order to create a liability for a breach of the covenant, it must appear that such was the effect of the conveyance. This intention is not apparent, we think, from the deed to the plaintiff upon its face. And even although there may be easements, which from their apparent connection with the premises may be said to be fairly included within a general description of appurtenances, such a rule would scarcely apply to a lot in a city where buildings may be conveyed in an incomplete and an unfinished condition, and the right claimed is not stated in the deed. In fact an appurtenance which is conveyed by general terms in a grant must be something which necessarily attaches to the land conveyed as a matter of right, and beyond this the right to the enjoyment of an easement must depend upon the language of the instrument. General terms cannot convey a right which the grantor was not authorized to impose upon the land of an adjoining owner, or render the grantor liable in an action for a breach of the covenant of warranty. Nor in such a case, where the right to create has no foundation, is any presumption to be indulged from the ordinary covenants of a warranty deed. In 3 Willard on Real Prop. 514, § 4, the general rule is laid down "an easement appurtenant to land passes with the land. *

* But an easement which is extinct or which has no legal existence, though used *de facto*, does not pass as an appurtenance." In *Plant v. James*, 5 B. & Ad. 791; 27 E. C. L. R. 191, Lord DENMAN says, "Nothing is more clear than that under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or create such a right he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee." If the rule laid down be followed, it

is certainly not obvious how a grantor who commits a trespass or a nuisance upon the land of another can convey the same as an easement or an appurtenance by virtue of a deed of the land. Much less can this be done without the use of apt and appropriate words for that purpose. None of the decisions of this court which have been cited conflict with the rule laid down in the cases already referred to. See *Simmons v. Cloonan*, 81 N. Y. 557; *Curtiss v. Ayrault*, 47 id. 73; *Lampman v. Milks*, 21 id. 505; *Huttemeier v. Albro*, 18 id. 48; *French v. Carhart*, 1 id. 96.

The case of *Adams v. Conover*, 22 Hun, 424, decided in the Supreme Court, holds that it is not necessary that the appurtenances of land conveyed, *i. e.*, the right to overflow adjoining land, should be specially described in the deed. This rule was laid down in the case cited upon the authority of the decision in the case at bar in the Supreme Court. The exact terms of the deed in the case cited were not before that court, and the construction given is based upon the assumption from oral evidence that it was an ordinary warranty deed. It may also be remarked, that in the conveyance of a mill site, the water privilege is a most important element of value, and hence in determining what shall pass as an incident appurtenant to that in the terms conveyed by the grant, it is the necessity of the mill and its free enjoyment which controls. *Voorhees v. Burchard*, 55 N. Y. 98. Such a case bears no analogy to a deed of land by metes and bounds, with the usual covenant of quiet enjoyment and a warranty. Giving full effect to the conveyance of the premises to the plaintiff, we are of the opinion that there is no rule of law which authorizes the construction that the main sewer upon the lot conveyed could be rightfully and lawfully used to conduct the drainage of the water-closet upon the premises owned by Albertson.

It is claimed that the deed may be construed having in view the parol testimony introduced upon the trial to show the agreement, and that the words "with the appurtenances" may be read as if the deed had in that connection contained the words, "to wit: the sewer leading from the water-closet of said house," and as it does not specify what was regarded by the parties as an "appurtenance," the meaning of that word is left open for explanation by parol evidence, not to contradict or modify, but to apply the language of the deed. There was evidence upon the trial tending to show that at the time of the sale this sewer was built, and that it was con-

nected with the water-closet, which could not be used without it. It was also proved that the plaintiff was informed of the existence of the sewer privilege, and that it largely enhanced the value of the house and lot, to the amount of \$2,000, and this evidence was not objected to. There was a conflict as to most of these facts. The defendant denied that any such representations were made in fact, and testified that he told the plaintiff that he had no right to use the sewer for household purposes, and that she must build a privy in the yard. As the deed merged all prior and contemporaneous agreements which had been made, the parol evidence was inadmissible for the purpose of controlling its legal effect, or modifying or enlarging its meaning or import. It was not sufficient to convey the right to the use of the sewer upon its face, and the effect of the testimony was to contradict and control its operation, and to give it more force than legitimately could be derived from the language used, and the apparent intention of the parties. Such evidence was incompetent for any purpose (*Mott v. Palmer, supra*), and even if received without objection, could not change the legitimate effect of the deed. The case presented bears no analogy to one where a description of land conveyed by deed is vague and uncertain, and parol evidence is admissible as to the real boundaries to identify the subject-matter, and to show what the grantor intended by a general designation of a particular portion. *Pettit v. Shepard*, 32 N. Y. 97. If the representations made by the defendant were fraudulent in regard to the extent of the right to the use of the sewer, an action would lie to recover damages for the fraud and deceit. *Whitney v. Allaire, supra* ; *Wardell v. Fosdick*, 13 Johns. 325 (7 Am. Dec. 383). The plaintiff was at liberty to pursue this remedy if she could establish the fraud. If as suggested by the counsel for the respondent, the defendant honestly believed that he had a right to continue the use of this sewer, and such belief was erroneous, and thus an action for the fraud could not be maintained, the fault must rest upon the plaintiff for not protecting her rights by demanding a proper conveyance, and requiring that a suitable provision be inserted in the same for that purpose.

From the discussion already had it is entirely obvious that the judge erred in denying the motion made by the defendant's counsel for a nonsuit, upon the ground that it was not shown that the defendant, at the time of the execution and delivery of the deed, had an easement or a right to drain into the sewer in question the

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privy and sink deposits; that they were not mentioned in the deed, and that there was nothing to show the intent to convey such right to the plaintiff, and also in refusing to charge as requested by the defendant's counsel, that the plaintiff must show that the defendant had an easement and right to drain the privy and sink deposits upon the lands of Albertson at the time of the delivery of the deed.

[Omitting a minor inquiry.]

Without passing upon this question, for the errors which have been discussed the judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, except FOLGER, C. J., absent at argument.

NOTE BY THE REPORTER. — See as to easement in a mill-dam, *Baker v. Bessey*, ante, 377. As to ways, *Parsons v. Johnson*, 68 N. Y. 62; s. c., 23 Am. Rep. 149; *O'Rourke v. Smith*, 11 R. I. 259; s. c., 23 Am. Rep. 440, and note 446; *Mitchell v. Seipel*, 53 Md. 261; s. c., 38 Am. Rep. 404, and note 415; *Goodal v. Godfrey*, 53 Vt. 219; s. c., 38 Am. Rep. 671.

In the recent case of *Dollif v. Boston and Maine Railroad*, 68 Me. 173, it was held, that a right of drainage by an existing underground drain through the grantor's adjoining land will not pass by implication, unless clearly necessary to the beneficial enjoyment of the estate conveyed. The court said:

"Undoubtedly such a right may be established by an implied grant as well as by an express grant. But implied grants are not to be favored. They should not be held to exist except in cases of clear necessity. If it is intended that an easement shall pass as one of the appurtenances of an estate, it is very easy to have this intention expressed in the deed. If the deed is silent upon the subject it is no more than fair to the grantor to presume that he did not so intend; and to overcome this presumption, to require of the party claiming the easement clear proof that it is necessary to the beneficial enjoyment of the estate conveyed to him. Such is the doctrine maintained in Massachusetts, and it meets our approbation.

"In *Johnson v. Jordan*, 2 Metc. 234, the court held that where the owner of two adjoining messuages and lots of land constructs a drain through one of them for the drainage of the other, and then sells the lots to different purchasers on the same day, and in the deed of the lot drained does not mention the drain, such purchaser acquires no right to the use of the drain through the other lot, if he, by reasonable labor and expense, can make a drain without going through that lot.

"In *Thayer v. Payne*, 2 Cush. 327, the court say that the question in such a case is whether the drain is necessary to the beneficial enjoyment of the estate conveyed; that this question involves the inquiry whether or not a drain can be conveniently constructed at a reasonable expense without going through the grantor's land; because if the grantee can thus furnish his premises with a drain, it cannot be necessary to the enjoyment of his estate that he should have a drain through the grantor's land.

"Upon this point the plaintiff's case falls. The burden of proof is upon them to show, not only that a drain to their premises is necessary, but that it is necessary that it should go through the defendants' land. In other words that they could not, at a reasonable expense, provide their premises with a drain without going through the defendants' land."

See to same effect, *Butterworth v. Crawford*, 46 N. Y. 349; s. c., 7 Am. Rep. 352; *Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 id. 366; *Warren v. Blake*, 54 Me. 287; *Denton v. Laddell*, 8 C. E. Green, 64; 9 id. 567. Compare *Watts v. Kilson*, L. R., 6 Ch. App. 166.

In *Philbrick v. Ewing*, 97 Mass. 133, there was a grant of a house and lot with warranty. The only supply of water was by a pipe laid across land of a third person, to a highway, where it joined the pipes of an aqueduct company. By contract with the company the

grantor had a right to draw water through his pipe. His pipe had been laid by a tenant of his, under an oral license from the third person whose land it crossed, and purchased from him by the grantor. The deed did not mention the pipe. After deeding, the grantor dug up the pipe on the land of the third person and carried it away. *Held*, that it was a fixture appurtenant and passed by the deed, but that the deed conveyed no right to draw water through the pipe from the highway. The court said it was a novel case, and observed: "We do not perceive, upon these facts, that any right of water would pass by the grant of the house, as an appurtenance. * * * An easement where it is not expressly described in the conveyance must actually belong to the estate conveyed in order to pass by implication. The rule is commonly stated to be that the grantor conveys by his deed, as an appurtenance, whatever he has the power to grant, which is practically annexed to the premises at the time of the grant, and is necessary to their enjoyment in the condition of the estate at that time. * * * The defendant did not own the water that came to the plaintiff's house. * * * The pipe was put in by his tenant, and afterward purchased from the tenant by him, as one entire thing. It was designed for the use of the plaintiff's house and for no other purpose. If it extended into the land of a third person, and into the highway, it does not appear that the owner of that land objects to its continuance, or authorized or required the defendant to remove it. We are therefore of opinion that the whole of it, at the time of his conveyance to the plaintiff, was a fixture annexed to the house, and passed by the deed. He had no more right to cut off a piece of the pipe, because it ran into another's land, than he would have had to cut off a piece of a spout which projected over the adjoining premises. If the owner of that land objected to its continuance, the plaintiff would be obliged to draw her pipe in; but until objection was made, or if she could obtain for it a license for it to continue, she could let it remain as her predecessor had done."

The leading English case is *Nicholas v. Chamberlain*, Cro. Jac. 121, where it was *held*, that "if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new as the case may require."

In *Pier v. Carter*, 1 H. & N. 916, a house was converted into two, and sold to different persons, and there being but a single drain, it was held that there passed by implication to the subsequent purchaser the right to use it. Here, although the defendant was ignorant of the drain at his purchase, it was held he must or ought to have known that some drain existed; that he was put on inquiry, and inquiry would have disclosed the existence of the drain; and that by "apparent signs" must be understood not only those necessarily visible, but those which might be ascertained by careful inspection by an ordinarily careful person. The same principle was declared and this decision was approved by the House of Lords, in *Ewart v. Cochran*, 4 Macq. 117. It was also approved and followed in *Polden v. Bastard*, in the Exchequer Chamber, L. R., 1 Q. B. 156; and in *Watts v. Kelom*, L. R., 6 Ch. App. 186. But it was disapproved and rejected in *Suffield v. Brown*, 4 DeG., J. & S., 135; *Crossley v. Lightowler*, L. R., 2 Ch. App. 436; and *Buss v. Dyer*, 125 Mass. 287; and doubted in *Butterworth v. Crauford*, *supra*. Mr. Washburn and Mr. Goddard, however in their works on Easements, seem to regard it as still authoritative and not necessarily overruled.

In *Brain v. Murrell*, English Court of Appeal, 41 L. T. (N. S.) 455, defendant sold to plaintiff a spring, and the right of conveying water therefrom through defendant's land, without interruption or disturbance by him, his heirs, assigns or others. The defendant also sold to a railway company other lands near the spring, and the company drained the land so that the water was cut off before it reached the spring, and the spring became dry and no water flowed through the plaintiff's pipes. In an action for breach of agreement, *held*, that the defendant had only conveyed the flow after the water had reached the spring, and the action would not lie. The court doubted whether the railroad company were "assigns" of the defendant, but they put the decision on the other ground. COLERIDGE, C. J., and BROWNELL, L. J., held that the defendant himself might have dug a well on his land, which should have drained the spring in question by percolation, as he had not conveyed away his common-law right.

Green v. Collins.

In *Buss v. Dyer*, 125 Mass. 287, similar doctrine was held as to a chimney between two houses of the same owner, but wholly on one lot; on sale of the other lot an easement in the chimney was held not to pass by implication, there being no absolute necessity for it. This, it will be observed, was a case of an apparent easement. The court said: "We are aware that it has been held in some English cases that a deed of premises carries the right to continue to enjoy as easements all privileges or conveniences in and upon adjoining lands of the grantor, which were apparent, and had been used by the grantor in connection with the premises before the conveyance; that the conveyance is a conveyance of the premises 'as they are.' A leading case to this effect is *Pyer v. Carter*, 1 H. & N. 916. Similar doctrine has been held in New York. *Lampman v. Milks*, 21 N. Y. 506. We do not regard this as a correct view of the law.

"It is a well-established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where by a fiction of law there is an implied reservation or grant to meet a special emergency on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed.

"In this Commonwealth grants by implication are limited to cases of strict necessity. *Carbrey v. Willis*, 7 Allen, 364, and cases cited; *Randall v. McLaughlin*, 10 Id. 368. The case of *Pyer v. Carter* was denied by Lord Chancellor WESTBURY, in *Suffell v. Brown*, 4 De G., J. & S. 185, which has been since recognized as containing the correct doctrine. *Crossley v. Lightowler*, L. R., 2 Ch. 478; *Watts v. Kelton*, L. R., 6 Ch. 166.

"In this view of the case it appears that the jury found that the use of the chimney was not necessary to the enjoyment of the premises owned by the plaintiff. This being so, no easement in the chimney was reserved by implication in the deed to the defendant's grantor, and the defendant in destroying the chimney merely exercised a right of ownership."

Lampson v. Milks, *supra*, was a case of a visible artificial channel for water, and *Pyer v. Carter*, *supra*, was a case of roof drainage.

In the principal case in the Supreme Court, 20 Hun, 474, LEARNED, J., delivered a dissenting opinion, in which he said: "There might be a case where an easement was in fact appurtenant to the land conveyed, and where the grantor's title to the land failed, and the grantee was evicted of the land, and of the easement appurtenant thereto; but that is not the present case. So too there might be a case where the grantor should in express words describe a certain easement, and should warrant the same to the grantee; but neither is that the present case. The grantor did not in this case warrant the easement unless a general warranty of the premises is a warranty of every easement, which at the time has the appearance of being appurtenant thereto, although in fact it is not so appurtenant. I find no authorities to sustain this doctrine." "In the present case the covenant of the defendant was to warrant and defend the premises thus conveyed. What then, according to the language of the deed, did the defendant purport to convey? A house and lot as described. Now if he had used no other words could it be said that by the language of the deed he purported to convey the sewer in question? Certainly not. Nor by adding the words, 'with the appurtenances,' did he as above shown give any other or greater effect to the deed. For the very meaning of that word 'appurtenances' is that which legally belongs to the principal thing, and therefore passes with it."

The principal case is apparently *sui generis*, because the apparent easement was in the land of a third person; and it cannot be sustained nor reconciled with the decision of the same court in *Adams v. Conover* (affirming that of the Supreme Court, *see post*), except upon the ground of the necessity of the apparent easement in the latter case, and the consequent estoppel of the grantor from asserting that he had no right nor power to convey it.

For a criticism on the principal case, and on *Adams v. Conover*, referred to in it, see 35 Alb. Law Jour. 279

FULLER V. ROBINSON.

(86 N. Y. 306)

Evidence — custom — unreasonable.

In an action of damages for fraudulent representations, by a broker employed to sell cigars, as to responsibility of a proposed buyer from the principal, evidence was admitted on behalf of the defendant, in order to show that the principal did not rely on the representations, that by custom and usage, manufacturers and dealers in cigars do not rely on representations by brokers as to the responsibility of purchasers. *Held*, error.

ACTION of damages for false representations. The opinion states the case. The defendant had judgment below.

Charles C. Bonney, for appellants.

Samuel G. Courtney, for respondent.

ANDREWS, J. The letter of September 5, 1874, written by Robinson, was an important item of evidence bearing upon the question of his complicity in the gross fraud practiced upon the plaintiffs. It is a conceded fact, that prior to the date of the letter the plaintiffs had employed Robinson as broker, to make sales of cigars in the city of New York, and other eastern markets. The plaintiffs were residents of Illinois, where the cigars were manufactured. In the letter, Robinson advises the plaintiffs of the sale by him on the previous day to Richardson, of twelve cases of cigars, then in his possession, and referring to Richardson he says: "Mr. R. is A No. 1, and good for all you can sell him." Robinson inclosed, in the letter, an order for 500,000 cigars, to be manufactured and sent to Richardson, on sixty days' credit, the prices of which were specified. Robinson states in the letter that he had taken this order from Richardson. The plaintiffs filled the order, and sent the cigars to Richardson. When the acceptances taken for the goods matured they were protested, and no part of the debt has been paid. The evidence clearly shows that Richardson was an adventurer, without means or credit, and that he was a party to a fraudulent scheme to get possession of the plaintiffs' property. The transaction, so far as Richardson was concerned, was a cheat and swindle. The defendant Robinson claimed that

he acted in the matter in good faith, and was himself deceived. When the letter was written, he had never seen Richardson. The twelve cases reported in the letter as having been sold by him were in fact sold by the defendant Hunt, the general agent of the plaintiffs, and the order for the 500,000 cigars was taken by Hunt, and not by Robinson. The misstatements of fact in the letter were explained on the trial by Robinson, and as the jury found in his favor, the explanation may have been satisfactory, and the verdict may have passed in his favor on the ground that he was not a guilty participant in the fraud.

But it was claimed on the trial by the counsel for Robinson that the plaintiffs, in selling the goods, did not, in fact, rely upon the representation as to the credit and solvency of Richardson, contained in Robinson's letter; and the court, upon his request, charged the jury, that if the plaintiffs in filling the order did not rely upon the statements contained in the letter, he was entitled to a verdict in his favor. The jury may therefore have based their verdict in favor of Robinson on this issue, and it becomes material to inquire whether any incompetent evidence bearing thereon was admitted, prejudicial to the plaintiffs. The defendant was permitted to show, by persons engaged in the tobacco trade, that by the custom and usage of that business, no reliance is placed by manufacturers and sellers of cigars and tobacco upon the representation of brokers employed to make sales, in respect to the credit of the persons from whom time orders are procured, but that the principal ascertains for himself, whether the persons ordering through the broker are entitled to credit, paying no regard to the broker's representation upon the subject. The only conceivable purpose of this evidence was to lay the basis for an inference by the jury, that Robinson's representation as to the credit of Richardson, although it might be found to be false, and made with intent to defraud, did not in fact influence the plaintiffs, and that they filled the order, and parted with their goods, without placing any reliance thereon. We think this evidence was incompetent.

Evidence of a usage, or custom of trade, is frequently admitted to annex unexpressed incidents to contracts, or to explain ambiguous and doubtful phrases in written agreements. But reasonableness is one of the requisites of a valid usage, and an unreasonable or absurd custom cannot be set up to affect the legal rights of parties. Evidence of the custom of a particular trade is admitted, to

supply what is not expressed, or to explain what is doubtful, upon the presumption that persons engaged therein are acquainted with, and understand and tacitly assent that their contracts shall be interpreted in the light of, the recognized usages. But there is no ground for this presumption, where the usage attempted to be shown is repugnant to common sense, or is based upon a disregard of the relations which exist between men, or the duties which in law and morals they owe to each other.

In this case the broker was employed to sell goods in the New York and eastern markets, manufactured by principals residing in a distant State. The broker was bound to the utmost fidelity in the business of his employers. His relation to them was such, that naturally his representations in respect to the commercial credit and pecuniary ability of his customers would carry weight and influence. He was bound in law, and in morals, to make no representation which he knew to be false, and to conceal nothing which he should learn in the course of his employment, which it was for the interest of his employers to know. The plaintiffs had intrusted him with their interests. They of course would take notice of the fact that the broker was interested to earn his commissions, but they had a right to assume that representations made by him in the course of his employment would be truthful. The custom and usage which was allowed to be shown proceeds upon the theory, that a broker in the tobacco trade is unworthy of the confidence of his employer, and that this is so well understood, that it has become the rule of the relation between them, that the employer ignores and disregards the representations of the broker, upon the vital question of the financial credit of customers, although the representation was made in the course of his duty. It was competent for the defendant to show, that the plaintiffs did not in fact rely upon, and were not influenced by the representation contained in his letter. But this could not be shown, we think, by proof of a custom or usage in the tobacco trade. The question, although somewhat informally raised, was sufficiently presented by the exceptions.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur.

Kiff v. Youmans.

KIFF V. YOUMANS.

(88 N. Y. 294.)

Damages — exemplary — excessive force against trespasser.

In an action of assault and battery, it appearing that the plaintiff was trespassing on the defendant's premises, and that the latter used excessive force in ejecting him, exemplary damages are not recoverable.

ACTION of assault and battery. The opinion states the facts. The plaintiff had judgment below.

William Youmans, for appellant.

William Gleason, for respondent.

DANFORTH, J. Although the trial judge was of opinion that a smaller verdict would have done better justice between the parties, he felt its adjustment, under the rules laid down by him, was within the province of the jury, and the General Term refrained from interference, because it did not appear they were actuated in rendering it by prejudice, passion or other improper motive. On the other hand, the respondent contends that the verdict would have been much larger if the court had not decided as a matter of law, that in the transaction submitted to the jury the plaintiff was a trespasser. Before this court both decisions are final. We cannot interfere, because of the amount of damages (*Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310; *Gale v. Same*, 76 id. 594; *Standard Oil Co. v. Amazon Ins. Co.*, 79 id. 506); nor can the plaintiff retain them, unless they were adjusted by rules to the benefit of which he is entitled in the character with which he was invested.

It was held against him, that at the time of the affray, he was upon the defendant's premises for the purpose of doing an act without license or right; that the defendant was justified in removing him therefrom by force; and that the only question was, whether the defendant "exercised more force and violence upon the person of the plaintiff than was necessary to prevent him from completing his trespass." If he did, the court said, the plaintiff would be entitled to a verdict for such sum of money as would fully compensate him for all the injury he had sustained, including detention from

his customary duties, and injury or damage in his business, and for all the pain and suffering he had undergone, adding, "and in a case where the jury find the defendant's acts were wanton and malicious, they may, in addition to the compensatory damages, return a sum by way of punitive or exemplary damages — a sum beyond the actual damages, for the purpose of teaching the defendant, and all persons so inclined, to respect the rights of others." The latter clause of these instructions does not appear to be a legitimate result from the assumed facts. They are, first, an assault and battery committed by the defendant; second, circumstances palliating, if they did not wholly justify, the offense; third, those circumstances originating with, and constituting a fault or trespass on the part of the plaintiff; and in view of the finding of the jury, we may now add a fourth, that in repelling the trespasser more than necessary force was used. It will simplify the discussion to bear in mind that no question is made but that these facts entitled the plaintiff to compensation for actual damages. The exception relates to that part of the charge permitting addition thereto by way of punishment to the defendant and admonition to others.

Whether the doctrine which permits vindictive, or as they are termed here, punitive or exemplary damages, can in any action of this character be justified upon principle, it is not necessary to inquire. For assuming that it is so firmly established as to make any save legislative investigation useless (*Hunt v. Bennett*, 19 N. Y. 173; *Hamilton v. Third Ave. R. R. Co.*, 53 id. 25), we think it has no application to the case before us, and that the learned trial judge erred in submitting it to the jury as one which in any aspect could be responded to by such allowance.

The defendant was upon his own premises. The plaintiff entered for the purpose, deliberately formed, of doing an act, which if persisted in, would impose a burden upon the land and impair the defendant's enjoyment of his own property. The natural event of such a trespass was to incite resistance, and so lead to a disturbance of the public peace. *Filkins v. People*, 69 N. Y. 101; s. c., 25 Am. Rep. 143. It was not accidental; the positive misconduct of the plaintiff originated and promoted it. Instead of submitting the right which he asserted, and the defendant denied, to the proper decision of the courts, he took its administration in his own hands, adjudged the right in his own favor, and undertook its enforcement. Properly invoked, the law has pronounced against him to

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be a wrong-doer, instead of an executor of a just judgment, and therefore the aggressor in the strife which followed. It finds therefore that his adversary was justified in repelling the enforcement of that self-asserted right, but that he exceeded the bounds of proper passion in so doing, and for this excess should answer in damages. It was thus assumed in the very frame of the issue presented to the jury that some force was necessary, and that the defendant might lawfully lay hands upon the plaintiff. Up to that point, therefore, including the exercise of force sufficient to remove the plaintiff, the defendant was without fault. Whatever injury the plaintiff sustained resulted, in part, at least, from its application, and so much the plaintiff brought upon himself. But all acts of the defendant upon this occasion were directed to the removal of the aggressor. Nothing more than this is suggested, or can be gathered, from the instructions of the court. And whether, in requiring that removal, the defendant was instigated by wantonness or malice is immaterial. The exercise of a legal right cannot be affected by the motive which controls it. *Phelps v. Nowlen*, 72 N. Y. 39; s. c., 28 Am. Rep. 93; *Corey v. People*, 45 Barb. 262. It is true, as has been urged in support of the judgment, that the owner of land, when removing a trespasser, might take an opportunity, under pretense of right, to inflict on him a wanton and malicious assault. But the attention of the jury was not directed to such a question. They were not asked to inquire whether this was in fact the purpose of the defendant. If it had been, and they had so found, it is not necessary to deny that under adjudged cases the charge, in the respect objected to, could be upheld. But on the contrary, it was assumed that the object of the defendant was to stop a trespass and restrain a trespasser. Yet the jury might well have understood the charge as applying to the whole procedure of the defendant, and to the motive with which any degree, as well as the excessive force, was applied. In that aspect it is clearly erroneous.

Let us take another view of the charge. Assume that it relates simply to the excess of force, and that the jury were called upon to determine whether it was applied wantonly or maliciously. Still the intention of removal was lawful, and the injury was done in executing it. The willful and deliberate act of the plaintiff, which constituted him a trespasser, was its proximate cause. *Filkins v. People*, *supra*. Yet it must be conceded that the defendant was

nevertheless bound to confine the force used by him to reasonable limits, defined by the necessity of the case. If he used more he became responsible for all consequences of the excess (*Filkins v. People, supra*; *Ilott v. Wilkes*, 3 B. & Ald. 304); or to present the point more distinctly, let us concede for that purpose, that inasmuch as the law gave authority to the defendant to repel with only necessary force the intruder, he, by excess abusing that authority, became a trespasser *ab initio*. It still remains that the plaintiff provoked the trespass, was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant (2 Greenl. Ev., § 98), it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass (*Avery v. Ray*, 1 Mass. 11; *Richardson v. Hine*, 42 Conn. 206; *Thomas v. Powell*, 7 C. & P. 807; *Lee v. Woolsey*, 19 Johns. 318 (10 Am. Dec. 230); *Corning v. Corning*, 6 N. Y. 103; *Cushman v. Ryan*, 1 Story, 100); and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them. 2 Greenl. Ev., § 267. A different rule is suggested in *Birchard v. Booth*, 4 Wis. 67, but in the later case of *Morely v. Dunbar*, 24 id. 183, the same court repudiates it, and declares that circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an excuse which will mitigate the actual damages, and even reduce them to a sum which is merely nominal; while *Robison v. Rupert*, 23 Penn. St. 523, lays down a rule not only supporting the same proposition, but quite applicable to the facts of this case. It was trespass for personal injuries. The plaintiff was shot, when with others he was annoying and disturbing the defendant, and after he had been warned to desist. The court charged "that these circumstances should go in mitigation of exemplary damages, but that the plaintiff was entitled to full compensation for all his sufferings, losses and expenses, notwithstanding the character of the provocation by which he drew them on himself." The plaintiff had a verdict, and upon error brought by the defendant, the court reversed the judgment saying: "Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation

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must be applied to the actual damages." When given they are superadded, as the learned trial judge in the case before us stated, to the former. It would seem to follow, therefore, that he who by reason of his fault cannot have the first must be destitute of any legal right to the other. They cannot stand in its place; nor can they be added to what does not exist. If the injury of which he complains came in part from his own act, there is less reparation demanded from the defendant, for the law seeks to do justice between the parties, and will not require one to atone for the other's error. If satisfaction is to be made for the breach of public order, it is not due to him, for his own wrong is the consideration upon which it stands, and for that he cannot be allowed to profit. Otherwise he would receive compensation for damages occasioned by himself. Yet we have this spectacle before us. A fine laid upon the defendant that the rights of others may be respected, and its payment ordered, not into the public treasury, but the hand of the first aggressor. The law is careful and exact in its dealings. It denies compensation to him who by his own negligence contributed to injuries from which he suffers. Much less will it allow one who excites public disorder to profit by punishment imposed upon his adversary for the protection of the community. In offending, the plaintiff came first. If he had kept the peace there would have been no second. It would very much impair that sense of security which grows out of the legal right to hold and enjoy property, and defend by reasonable force its possession, if the owner, when his rights are invaded, was required to answer not only for a failure to measure with precision the degree of strength applicable to the aggressor, but respond to him in a civil action according to the estimate which a jury, influenced by the impassioned appeals of private counsel, might place upon the value of public order. It would seem that the repression of crime by punishment, and to determine how far it shall be inflicted upon an offender, to prevent future injuries by himself or others, should be left to the courts constituted for that purpose. In their action the injured party can have no interest beyond that of every member of the community — which is, to be protected. Moreover, in such a prosecution, conducted by officials acting not from selfish motives or in the interest of either party, but from a sense of responsibility, there would be less danger of a miscarriage of justice by an inflamed sentence. But I do not mean to consider the general doctrine. The cases cited by the re-

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spondent are abundant to show that such damages are, in many civil actions, allowed. I find not one however which goes far enough to sustain the ruling before us, and there is no principle which requires the extension of the doctrine. *Dain v. Wycoff*, 7 N. Y. 191. Without considering other exceptions, the views above expressed require that the exception already noticed should be sustained.

The judgment appealed from should therefore be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

RAPALLO, ANDREWS and MILLER, JJ., concur; FOLGER, C. J., and FINCH, J., did not concur in opinion; EARL, J., absent at argument.

RODGERS V. PEOPLE.

(88 N. Y. 280.)

Criminal law — burglary — room of guest at inn.

in an indictment for an attempt to commit burglary, the chamber of a guest at an inn must be laid as the dwelling-house of the innkeeper and not of the guest.

CONVICTION of attempt to commit burglary. The opinion states the case.

Charles W. Brooke, for plaintiff in error.

Daniel G. Rollins, district attorney, for defendant in error.

ANDREWS, J. The first count of the indictment charges, that the dwelling-house, which the prisoner is alleged to have attempted to break and enter, was the dwelling-house of one Adoniram J. Shippee. The evidence discloses that the building was the Astor House, in the city of New York, kept by Allen & Dam, lessees, as an inn. The lessees did not reside in the building. One Lansing was manager of the house, for the lessees. He was at the hotel during business hours, and took his meals there, and sometimes slept in the house, but his residence was with his family, at a house on Forty-sixth street. Shippee was a resident of Albany, but was

a guest in the hotel, at the time of the commission of the alleged offense. The attempt to commit burglary, of which the prisoner was convicted, consisted in his boring through the door of the room which had been assigned to Shippee, and of which he had a key, with a view to reach and withdraw the bolt, by which it was fastened, and thereby enable the prisoner to enter and steal his goods.

The prisoner's counsel, on the conclusion of the evidence, requested the court to charge the jury, that there was not sufficient evidence to warrant a conviction under the first count in the indictment. The court declined so to charge, and the prisoner's counsel excepted. This exception raises the question, whether the room of a guest in an inn is his dwelling-house, and may be laid as such in an indictment for burglary in breaking and entering it, or whether it should be laid as the dwelling-house of the landlord.

It seems to be settled by authority that the inn in such case is in contemplation of law the dwelling-house of the landlord, and not of the guest, and that it should be so described in the indictment. Lord Hale says: "And so it is, if A. comes to the inn of B. and there hath a chamber appointed for his lodgings, and this chamber is broken up burglarily, it shall suppose it to be *domus mansionalis* of B., the innkeeper, because the interest is in him, and A. hath only the use of it for his lodging, without any certain interest." 1 Hale P. C. 557. Hawkins says: "If several persons dwell in one house, as servants, guests, tenants at will, or otherwise, having no fixed or certain interest in any part thereof, and burglary be committed in any of their apartments, it seems clear that the indictment shall lay the offense in the mansion-house of the proprietor." 1 Hawkins P. C. 134. East says: "If a person inhabit a dwelling-house as a wife, guest, servant, or part of the family of another, it is the occupation in law of such other person, and must be so laid in the indictment." 1 East P. C. 500. And again he says (p. 502), (citing *Prosser's* case, tried in 1768, where the point was adjudged): "By the same rule, if the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper." Mr. East states the rule as deduced from the authorities to be, that "where the legal title to the whole mansion remains in the same person, there, if he inhabit it by himself, his family, or servants, or even by his guests, the indictment must lay the offense as committed against his mansion." *Id.* 500.

It is suggested by the learned district attorney, that the rule, that an inn is the mansion-house of the proprietor, and must be so charged in an indictment for burglary, was established when it was the habit of innkeepers to dwell in their inns, and that it has no application in these times, when landlords often reside with their families in a house separate from the inn. But we think we should not be justified in affirming the conviction upon the distinction suggested. Burglary, at common law, is an offense against the habitations of men; and a building must be occupied as a residence, to make it a dwelling-house, the breaking and entry of which will constitute the burglary of a dwelling-house. But actual residence therein by the owner is not essential to constitute the house his dwelling-house. A house in which a wife is permitted to live separately, owned by the husband, but in which he never lived, is properly described in an indictment as his dwelling-house. *Rex v. French*, Russ. & Ry. C. C. 491; *Rex v. Wilford*, id. 517. So a house of a corporation aggregate, occupied by its servants, may be described as the mansion-house of the corporation. *Ann Hawkins'* case, Leach's Cr. Law, 324, notes; 1 East P. C. 501. In *Rex v. Stock*, Russ. & Ry. C. C. 185, where the servant of three partners in trade, had weekly wages, and some rooms assigned to him, for a lodging over the bank and brewery office of the partners, with which his lodging communicated by a trap door and a ladder, it was held that a burglary committed in the banking-house was well laid as in the dwelling-house of the three partners. The reason given by Lord Hale, why the chamber of the guest in an inn is the mansion-house of the innkeeper, and not of the guest, and must be so charged, is as applicable where the innkeeper does not personally reside or lodge in the inn, as when he does. The guest has no interest, but only the use of the chamber for the time being. The legal possession of the room is in the innkeeper. He must answer for the loss of the goods of the guest by theft. The inn, and the rooms therein, are occupied by the innkeeper. He assigns rooms for temporary occupancy by his guests, in the prosecution of his business, and for his profit. The general rule is, that the occupation of a servant is the occupation of the master. But where the servant lives with his family in a separate house, of which he has the exclusive occupation — as where a gardener lives in a cottage distinct from the master's house, though on his premises — an indictment for burglary may properly describe the house

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as his dwelling-house. *Rees v. Rees*, 7 C. & P. 568. There are many nice distinctions in the cases on this subject, which will be found collected in treatises on the criminal law. But the rule seems to be without exception, that where a dwelling-house is occupied by a servant, as the house of the master, and in his master's business, it is the master's dwelling-house, and that an indictment for a burglarious entry must so describe it; and the further rule that the room of a guest in an inn is not his dwelling-house, has, so far as we can find, been uniformly recognized since the time of Lord Hale.

We are of opinion that the indictment was fatally defective, in laying the offense as against the dwelling-house of Shippee. It should have been laid as against the dwelling-house of the keepers of the inn.

The conviction should therefore be reversed.

Judgment reversed.

All concur.

SHIPPLY V. PEOPLE.

(38 N. Y. 375.)

Criminal law — larceny — what constitutes.

The prisoner agreed to buy goods of a merchant for cash, the goods to be delivered C. O. D., to an expressman whom he would send. Shortly after, an employee of the prisoner called at the merchant's shop, falsely representing himself to be an expressman, and stating that he had come for the goods. They were delivered to him with instructions to collect on delivery. He delivered them to the prisoner, receiving from him a worthless check, which he left at the merchant's shop in his absence. The prisoner refusing to give up the goods or pay for them, *held*, that a conviction of larceny was justifiable. (*See note*, p. 553.)

CONVICTION of larceny. The head note and opinion show the facts.

William F. Kintzing, for plaintiff in error.

Daniel G. Rollins, district attorney, for defendant in error.

DANFORTH, J. We think neither of the exceptions is well taken. The evidence of facts assumed by the prisoner's counsel in his request for an acquittal was far from conclusive. A sale has been defined to be a transfer of the absolute property in a thing for a price in money (Benj. on Sales, 1); and this expresses the general understanding of the term. But within any definition it must include those elements, and the transfer must of course be with the assent of the owner. The jury may have found that the prisoner's case fell short of this. The owner agreed that he should have the goods on payment of or when he paid the price, not before. It was the understanding of both that the two events were to be contemporaneous. This was the agreement. The goods were secure in Howard's possession, the title was in him, and although he sent them from beyond the walls of his store it was upon the same agreement, and his relation to them was unchanged. Nor was the actual custody altered. He placed them in the hands of one who as to him was an expressman or public carrier, with directions to deliver the goods only on receiving any pay therefor. The prisoner knew this, and knew that it was only by payment of money he would be entitled to the goods. No doubt if he had paid the money to Story he would have been relieved from liability, whether Story paid it over to Howard or not, for as to this, Story was Howard's agent, and his only authority was to hand over the goods on receiving the money. It was therefore a limited or special authority. It did not enable him to make a contract or waive the terms of one already made. He could part with possession, but the property nevertheless remained in Howard. In fact the assumed expressman was in the employ of the prisoner; but of this Howard was ignorant. The prisoner received the goods from Story without payment of money or other thing of value. The jury may have found that this was his scheme at the beginning, and thus that there was on his part a felonious intent—an *animus furandi*—pervading the transaction and continuing to the end; that there was no delivery by the owner or parting with the title; and if so, the verdict was right.

The learned counsel for the plaintiff in error has cited many cases to show that the offense is not made out if the owner intends to part with the property and delivers possession absolutely, although he has been induced thereto by fraudulent means. They have no application to the case in hand. The jury, under as must be as-

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sumed, a correct exposition of the law, have found to the contrary, and the evidence sustains the finding. The owner expected the property to be returned to him unless the money was paid. This the plaintiff in error knew, and when he received the goods, he obtained them not by Howard's parting with the property, but against his will and consent. His position therefore is not different from what it would have been, if at the time of the negotiation for the goods he had, after agreeing to buy, and assenting to the price and terms of cash payment, taken away the goods without payment or the consent of the owner. Neither the lapse of time nor the intervention of another party relieves him, for the authority of the pretended expressman, as we have seen, was limited. The condition was the same, viz.: when the prisoner paid the price, he should have the goods, and not before. He took them without the owner's consent, and without payment. Thus the offense in either case would be larceny. *Reg. v. Cohen*, 2 Den. C. C. 249; *Reg. v. Webb*, 5 Cox C. C. 154; *Reg. v. Slowly*, 12 id. 269; *Queen v. Prince*, L. R., 1 C. C. 150; *Hildebrand v. People*, 56 N. Y. 394; s. c., 15 Am. Rep. 435.

[Omitting a minor question.]

The judgment should be affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—In *People v. Justices, etc.*, Supreme Court of New York, March, 1882, a saloon keeper, who had furnished twenty-five cents' worth of liquor to a customer, received from him a twenty-dollar gold piece with directions to go out and change it, and bring back to the customer the change due to him. The saloon keeper went out for that purpose, gambled with the twenty-dollar gold piece, and lost it. *Held*, that he could not be convicted of larceny. The court, by DAVIS, P. J., said: "If the question presented by this case were a new one, we should have no hesitation in holding that the conviction was justified by the evidence, for it is clear that there was no intention on the part of the complainant in handing the twenty-dollar gold piece to be changed, to part with his property in it, but that he simply parted with possession for the specific purpose of having it changed so as to enable him to pay to the appellant twenty-five cents out of the change; and that the appellant having it for a specific purpose and without property, his possession was in law the possession of the owner of the coin, and his subsequent act in gambling it away was such a conversion as ought, and in our opinion does, constitute the crime of larceny. But the case is precisely parallel in all its features to that of *Reg. v. Thomas*, 9 C. & P. 741. In that case the prisoner took a sovereign to go out and get it changed, but never returned either with it or the change. COLERIDGE, J., held that the prosecutor, having permitted the sovereign to be taken away for change, could never have expected to receive back that specific coin; he had therefore divested himself at the time of the entire possession of the sovereign, consequently there was not a sufficient trespass to constitute larceny." After remarking that the judge evidently overlooked *Ann Atkinson's* case, Cas. Cro. Law, 247, the court continued: "But we are not at liberty to follow our own opinion of this case, because the Court of Appeals have distinctly recognised the

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case of *Reg. v. Thomas* as sound law. In *Hildebrand v. People*, 56 N. Y. 304; s. c., 18 Am. Rep. 435, the facts were these: "The prosecutor handed to the prisoner a fifty-dollar bill to take out ten cents in payment for a glass of soda. The prisoner put down a few coppers upon the counter, and when asked for the change he took the prosecutor by the neck, and shoved him out of doors, and kept the money. The question was whether larceny could be predicated upon those facts. The Court of Appeals, affirming the decision of this court, held that the prisoner was rightfully convicted. The prisoner relied upon the case of *Reg. v. Thomas*, and after reciting the facts in that case, the court proceeded to distinguish it from the one then at bar by stating that in the *Thomas* case 'all control, power and possession was parted with, and the prisoner was intrusted with the money, and was not expected to return it. Here, as we have seen, the prosecutor retained the control, and legally the possession and property. The line of distinction is a narrow one but it is substantial and sufficiently well defined.' * * * The distinction in the cases is so extremely 'narrow' that we should have felt entirely justified in disregarding it, but for the fact that the Court of Appeals, in *Hildebrand v. People*, gave its sanction to the case of *Reg. v. Thomas*, and declared it to be sound law, thereby holding in effect that a conviction of larceny could not be sustained in a case like this." The New York case is supported by *Reg. v. McKale*, 11 Cox C. C. 32. See also *State v. Anderson*, 25 Minn. 66; s. c., 33 Am. Rep. 455; *Smith v. People*, 53 N. Y. 111; s. c., 13 Am. Rep. 474.

Where the defendant put goods into a cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, his intention being from the beginning to get the goods by fraud, *held*, larceny. *Rex v. Pratt*, 1 Moody, C. C. 250. See also *Rex v. Campbell*, 1 id. 179. See also *Miller v. Commonwealth*, 78 Ky. 15; s. c., 30 Am. Rep. 194.

LANDERS v. WATERTOWN FIRE INSURANCE COMPANY.

(86 N. Y. 414.)

Insurance—fire—double insurance.

A policy of fire insurance, conditioned to be void in case of other insurance not indorsed or consented to, is avoided by the existence of another insurance, conditioned to be voidable for vacancy, and which might have been avoided on that account, but had not been, at the time of the insurance in question.*

ACTION on a policy of fire insurance. The opinion states the case. The plaintiff had judgment below.

Bradley Winslow, for appellant.

A. D. Wales, for respondent.

ANDREWS, J. The policy on which this action is brought was issued on or about August 1, 1873, and contains a condition, that

* See *contra*, *Fireman's Ins. Co. v. Holt* (35 Ohio St. 189), 35 Am. Rep. 624; *Jones City Ins. Co. v. Nichols*, *post*.

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"if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, not indorsed hereon, or consented to by this company or its authorized agent, in writing, this policy shall be void." The answer avers a breach of this condition, and alleges that at the time the policy was issued the house insured was covered by a prior policy, issued to the plaintiff in the Glens Falls Insurance Company for \$800, terminating May 1, 1874, the existence of which was not communicated to or known by the defendant. It was proved that the plaintiff in May, 1871, procured an insurance on the house in the Glens Falls Insurance Company for \$800, for the term of three years from May 1, 1871, not indorsed on the policy in suit, or consented to by the defendant, or its authorized agent, in writing. The policy in the Glens Falls Company contained a condition that if the insured premises should become vacant and unoccupied, or the risk should be increased by the erection or occupation of neighboring buildings, or by any means whatever, without the consent of the insurer, indorsed on the policy, it should be void.

The answer made on the trial to the defense of prior insurance was, that after the policy in the Glens Falls Company was issued, the house remained vacant for several months without the consent of the insurer, and that the risk had been increased by the plaintiff's having put into a mill near the insured premises an engine and boiler. The vacancy and the increase of risk by the putting in of the engine and boiler were proved. The policy in the Glens Falls Company had not however been canceled by the company, nor did it appear that the company knew of the vacancy or increase of risk. The plaintiff did not discover the provision in the policy of the Glens Falls Company, avoiding it for these causes, until after the fire. He procured the policy in the defendant's company for the reason that he supposed, although erroneously, that the term for which the policy in the Glens Falls Company was issued had expired or was about expiring.

The court on the trial overruled the defense based on the prior insurance, on the ground that the policy in the Glens Falls Company had become void in consequence of the vacancy and increase of risk, and consequently that there was no prior insurance when the defendant's policy was issued. In this ruling the court, we think, erred.

The prior policy was valid when issued, but was avoidable by the

company issuing it for breach of condition subsequent. But the company had not elected to avoid it for that reason. It was not certain that it would have so elected if the facts had been known to it. In some cases it might be very inequitable for a company to take advantage of the breach of a condition as to vacancy or increase of risk, to avoid a policy originally valid, although the legal right so to do might be unquestionable. It certainly would be competent for a company to waive such an objection. The first policy was voidable only at the election of the company. The condition was inserted for its benefit, but its violation did not, *ipso facto*, extinguish the policy. The condition in the defendant's policy was inserted to protect it from the hazard of over-insurance, and the existence of the policy in The Glens Falls Company was a breach of the condition.

No question arises in this case as to the rule in case the prior policy had been void in its inception by non-performance by the insured of a condition precedent.

It is claimed that the defendant's agent, when the application for the policy in suit was made, knew of the existence of the policy in The Glens Falls Company. The defense of prior insurance was not disposed of on this point. That question may be passed upon on a new trial.

The judgment should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur.

FLANIGAN V. PEOPLE.

(88 N. Y. 554.)

Criminal law — drunkenness as excuse for crime.

Drunkenness is no excuse for homicide, although the result of an irresistible appetite, overcoming the will and amounting to a disease, and is immaterial on the question of premeditation. (*See note, p. 560.*)

CONVICTION of murder. The opinion states the point.

Ammi Cutter, for plaintiff in error.

Edward W. Hatch, district attorney, for defendant in error.

MILLER, J. It is claimed that the judge erred upon the trial in refusing to charge, as requested by the prisoner's counsel, "that from all the evidence in the case, the jury may believe, if they see fit, that the prisoner may have been the victim of an appetite for drink, entirely overcoming his will and amounting to a disease; and that if they so believe, they must acquit the prisoner, unless they believe, beyond a reasonable doubt, that the act was not committed while his mind was overwhelmed by the effects of the liquor so taken." The proposition contained in this request was to the effect that the jury were authorized to believe that the prisoner was the subject of an appetite for intoxicating drinks, which entirely controlled his will, and to the extent of becoming a disease, and that he was not responsible unless the crime was committed while he was not under the influence of such disease.

The effect of this proposition would be to excuse the prisoner from the consequences of the crime committed, if he was laboring under intoxication so that his will was overcome, and not under his control at the time; in other words, that drunkenness, if carried to the extent of producing incapacity to control the action of the mind and will of the prisoner, would be an excuse for the crime committed.

The rule is well settled that voluntary intoxication of one who without provocation commits a homicide, although amounting to a frenzy, does not exempt him from the same construction of his conduct, and the same legal inferences, upon the question of intent, as affecting the grade of his crime, which are applicable to a person entirely sober. *People v. Rogers*, 18 N. Y. 9.

Within the rule laid down in the case cited, we think that the request to charge cannot be sustained. The position of the learned counsel for the prisoner is, that he had a right to go to the jury upon the question whether intoxication was a disease, as described in the request, and whether the prisoner was afflicted with it, and if the jury found both of these facts, the drunkenness could not have been voluntary, and if the jury believed the mind was overwhelmed by means thereof, that the prisoner must be excused as an insane man. It may be answered that no such distinct request was made; but aside from this, the position taken would be adverse to the principle which has been established by a long series of de-

cisions, and if enforced, might lead to exonerate offenders for crimes committed by them when under the influence of intoxicating drinks, and thus furnish an excuse for the commission of the most heinous offenses. The authorities all agree upon the proposition that mental alienation, produced by drinking intoxicating liquors, furnishes no immunity for crime, and to sustain the doctrine asserted, it would be necessary to overrule this well-established principle. The proposition contained in the request was also objectionable, as it assumed, that if the prisoner had become the victim of an appetite for strong drinks so as to overcome his will, and amounting to a disease, even although he was able to distinguish between right and wrong, at the time of and with respect to the act committed, he should be acquitted. *Flanagan v. People*, 52 N. Y. 467; s. c., 11 Am. Rep. 731.

The finding of the jury that the prisoner was affected with the alleged disease would not exonerate him from responsibility for the crime, and his intoxication did not authorize the court to charge as requested.

No error was therefore committed in the refusal of the judge to grant the request, nor was there any error in the refusal of the judge to charge, as requested, that the jury might "take into consideration the fact of drunkenness, as affecting each of the questions of deliberation and premeditation."

The question presented by this request has been the subject of consideration in the reported decisions in the courts of this State. In *People v. Rogers*, *supra*, a request was made by the prisoner's counsel to charge the jury to the effect that drunkenness might exist to such a degree that neither an intention to murder, nor a motive for the act, could be imputed to the prisoner. The request was refused, and DENIO, J., in discussing the question, says: "This would be precisely the same thing as advising them that they might acquit of murder on account of the prisoner's intoxication if they thought it sufficient in degree. It has been shown that this would be opposed to a well-established principle of law." He further remarks: "The judge ought to have charged that if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so, and that he must take the consequences of his own voluntary act." The doctrine thus laid down in principle would sustain the refusal of the judge to charge as requested in the case at bar. In *Kenny v. People*, 31 N. Y. 330, the prisoner

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was convicted of murder in the first degree, committed while in a state of voluntary intoxication, upon a sudden impulse. The court instructed the jury that voluntary intoxication can furnish no excuse or immunity for crime, and so long as the offender is capable of conceiving a design, he will be presumed, in the absence of contrary proof, to have intended the natural consequences of his own acts. The judge was requested to charge, among other things, that intoxication may be considered in determining whether the homicide was committed by a premeditated design, which was refused, and it was held by this court that there was no error in declining to charge as requested, and POTTER, J., cites from *People v. Rogers*, the remarks we have already quoted from the opinion in that case, and says, that "*People v. Rogers*, and the opinions delivered therein and the authorities cited, are conclusive and control this case." He further remarks that "the rule established in that case, and in fact the uniform rule in all the cases is, that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime." This case is directly in point in regard to the subject of premeditation, and the principle laid down would seem to cover deliberation also. As however the judge subsequently, in response to a request made by the prisoner's counsel to the effect that the jury might take into consideration the question of drunkenness as affecting the fact of deliberation, said that he had so charged and had left it to the jury to determine as to the degree of murder and whether there was deliberation, and thus allowed the jury to consider the intoxication of the prisoner in reference to deliberation, it is not necessary to determine the question whether the refusal to charge as to deliberation was erroneous.

The judge also charged, in response to a request of the prisoner's counsel, that if the jury believed that the prisoner was under the influence of liquor or drink at the time of the commission of the act, they might take into consideration the drunkenness of the prisoner as to whether it did not render more weighty the presumption of his having yielded to sudden passion rather than to previous malice. In an earlier portion of his charge, he stated that premeditation and deliberation was essential to establish murder in the first degree, and the entire charge on the question discussed was quite as favorable to the prisoner as the evidence warranted. The evidence was quite clear as to the intention of the prisoner, and to

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sanction a rule that his drunkenness was an excuse, would be adverse to the whole current of authority and what has been understood to be well-established law.

[Minor considerations omitted.]

No other question is presented by the counsel for the prisoner, and we are brought to the conclusion that no error was committed upon the trial which demands a reversal of the conviction. The judgment should therefore be affirmed, and the record remitted to the court below, with directions to proceed as required by law.

Judgment affirmed.

All concur; ANDREWS, J., entertained some doubt upon the point whether the court did not err in refusing to charge that the jury might consider the fact of drunkenness upon the point of premeditation, as well as upon the point of deliberation.

NOTE BY THE REPORTER. — See *Wood v. State*, 34 Ark. 341; s. c., 36 Am. Rep. 13; *State v. Triggs*, 33 La. Ann. 1066; s. c., 36 Am. Rep. 223; *Loza v. State*, 1 Tex. Ct. App. 423; s. c., 23 Am. Rep. 416; *Erwin v. State*, 10 Tex. Ct. App. 700; s. c., 38 Am. Rep., note 645; *Bewley v. State*, 50 Ala. 149; s. c., 20 Am. Rep. 292. The question has been considered in the following recent cases:

In *Willis v. Commonwealth*, 32 Gratt. 929, it was held that while voluntary intoxication is no defense to the fact of guilt, yet it may be considered to determine whether a homicide was committed from a premeditated purpose, or from passion excited by inadequate provocation, and thus to determine whether it was murder in the first or in the second degree. The court said:

"But voluntary intoxication is no excuse for the commission of crime. Lord Hale says 'the third sort of madness is *dementia affectata* — namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect but temporary frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses.' And so PARKE, B., says, if a man makes himself voluntarily drunk it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished.' Cited, 1 Whart. Crim. Law, § 32. And this writer says, in harmony with this is the whole current of English authority. And that 'in this country the same position has been taken with marked uniformity, it being invariably held that voluntary drunkenness is no defense to the *factum* of guilt.' Id. § 40.

"But while intoxication *per se* is no defense to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of it is admissible for the purpose of determining the precise degree. Id. § 41. In all cases where the question is between murder in the first degree and murder in the second degree, the fact of drunkenness may be proved to shed light on the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation.

"By our statute murder by poison and lying in wait, imprisonment, starving, or any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder of the second degree. Code of 1873, p. 1133, c. 137, § 1. To convict of murder in the first degree by willful, malicious, deliberate and premeditated killing, the jury must ascertain, as a matter of fact, that such was the state of mind of the accused when the act was done. Any state of drunkenness being proved, said the court in *Hails v. State*,

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11 Humph. 154, is a legitimate subject of inquiry as to what influence such intoxication might have had upon the mind of the offender in the perpetration of the deed. We know that an intoxicated man will often, upon a slight provocation, have his passion excited, and rashly perpetrate a criminal act. It is unphilosophical to assume that he should be chargeable with the same degree of premeditation and deliberation that would be ascribed to a sober man perpetrating the same act upon a like provocation. Hence the rule has been laid down by the courts, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprang from a premeditated purpose, or from passion excited by inadequate provocation. 1 Whart. Cr. Law, in note to § 41. Great caution is necessary in the application of this doctrine, for there are few cases of premeditated violent homicide in which the defendant does not previously nerve himself to the encounter by liquor. When that is so drunkenness is entitled to no consideration in favor of the offender in determining whether the offense is murder in the first or second degree. On the contrary, it tends strongly to elevate the crime to murder in the first degree. Voluntary immediate drunkenness is not admissible to disprove malice or to reduce the offense to manslaughter. But where, by reason of it, there is wanting that deliberation and premeditation which are necessary to elevate the offense to murder in the first degree, it is properly ranked as murder in the second degree, as the courts have repeatedly decided. *Com. v. Jones*, 1 Leigh, 508; *Pirtle v. State*, 9 Humph. 663; *Swan v. State*, 4 id. 136; *Boswell v. Commonwealth*, 30 Gratt. 860.

"In *Pirtle v. State*, *supra*, Judge TUNLEY, in delivering the opinion of the court, said, where the question is whether the killing was the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, or whether it has been the result of premeditation and deliberation, whatever is able to cast light upon the mental status of the offender is legitimate proof, and among others the fact that he was at the time drunk; not that this will excuse and mitigate the offense, if it were done willfully, deliberately, maliciously and premeditatedly (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat to the point of taking life, without premeditation and deliberation. Here the court explicitly lays down the rule to be that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprang from a premeditated purpose, or from passion excited by inadequate provocation. Cited, 1 Whart. Cr. Law, in note to § 41. The court, we think, very properly held that drunkenness will not mitigate the offense, if it were done willfully, deliberately, maliciously and premeditatedly. It is only entitled to weight when and so far as it tends to show that the offender did not act and was not in a frame of mind to act, with that deliberation and premeditation which is necessary to constitute murder in the first degree."

"Whilst we hold that intoxication is no excuse for crime, and whilst murder in the first degree may undoubtedly be committed by one who is intoxicated at the time, yet a murder committed, as in this case, by a drunken man from sudden passion, which imagines a provocation when there was none, or any adequate provocation, and by reason of intoxication the offender was not in a frame of mind to deliberate and premeditate the crime, we think, under the statute, could not be elevated to the crime of murder in the first degree, which requires that it shall be willful, deliberate and premeditated. But as intoxication is no excuse for crime, and cannot be relied on to disprove malice, we are of opinion that the prisoner in the case at bar was guilty of murder in the second degree."

In *Lancaster v. State*, 2 Lea, 575, the court said: "The Circuit judge charged the jury, 'If defendant had been drinking, much or little, it would be a circumstance for the jury to look to for the purpose of ascertaining whether the defendant's mind was so influenced by liquor as to incapacitate him from forming a deliberate and premeditated design, that is, his mind was so much influenced by liquor as to be incapable of contemplating the result of his acts, and if this was the condition of his mind he could not be convicted of an

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assault with intent to commit murder in the first degree; but if his mind was not in that condition, and was not so much influenced by liquor as to prevent him from forming a deliberate and premeditated design, drunkenness would then be no excuse, and would not lessen the crime.'

"In *Swan v. State*, 4 Humph. 136, Judge REXES, while very strongly stating the doctrine that 'drunkenness is no excuse for crime,' adds that 'when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time and with reference to the act done, drunkenness, as a matter of fact, is a proper subject for consideration and inquiry by the jury. The question in such case is what is the mental status? Is it one of self-possession, favorable to the formation of a fixed purpose by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, it may be on a peculiar temperament, or upon one already excited by ardent spirits?'

In 9 Humph. 663, the conviction was for murder in the second degree, and it was held that the drunkenness of the offender in the case of murder in the second degree, or manslaughter, can form no matter of legitimate inquiry, but that it is material where the inquiry is whether the acts were done with deliberation and premeditation. In the case of *Halle v. State*, 11 Humph. 154, a charge very similar to the one in this case, was held erroneous. The Circuit Judge had instructed the jury, 'if defendant was so deeply intoxicated as to be incapable of forming in his mind a design, and deliberately and premeditatedly to kill,' this would reduce the killing to murder in the second degree.

"Judge GREEN, in commenting on the opinion of Judge REXES in the case in 4 Humph. says, 'the court intended to be understood as distinctly indicating that a degree of drunkenness by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury in determining whether the killing were done with premeditation and deliberation.' In that case, as in this, the Circuit Judge told the jury that intoxication could not thus reduce the offense, unless it existed to such degree as to render the offender absolutely incapable of forming such design.

"All the cases cited hold that a drunken man may premeditate and deliberate yet they hold that the evidence of the fact of intoxication is proper to go to the jury, when they are to find whether the act in question was done with deliberation and premeditation, and that the jury may determine whether the act is the result of deliberation and premeditation, or of passion aroused by inadequate provocation.

"We are of opinion that the charge was erroneous in the particular indicated, and the judgment will be reversed."

In *Schlenker v. State*, 9 Neb. 211, it was held that voluntary intoxication is no excuse for crime, but may be shown to determine the question of premeditation, in order to distinguish between degrees of murder. The court said:

"That the prisoner was considerably intoxicated, and his mind somewhat clouded in consequence thereof, are doubtless true. But the fact that he was in a drunken state does not of itself render the act of shooting the deceased any the less criminal, nor is it available as an excuse. If notwithstanding his intoxication he were conscious that the act was wrong, he was a responsible agent and answerable for all the consequences. In charging upon this point the judge told the jury in substance that they were at liberty to take the fact of intoxication as a circumstance to show that the act of killing was not deliberate and premeditated. This was right, and suggested to the jury the full extent of the effect that might legitimately be given to it. *People v. Rogers*, 13 N. Y. 9. *People v. Belencia*, 21 Cal. 544.

"Several of the instructions given to the jury are also made the basis of alleged errors, but we fail to perceive any just ground for the complaint made in this particular. The instruction most complained of was given at the request of the district attorney, and was in these words: 'That settled insanity produced by intoxication affects the responsibility in the same way as insanity produced by any other cause. But insanity immediately produced by intoxication does not destroy responsibility when the patient, when sane and responsible, made himself voluntarily intoxicated.'

"In the case of *State v. Hundley*, 46 Mo. 414, it appears that the court had instructed the

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jury 'that if they believed from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was the immediate result of intoxicating liquors, or narcotics, he was guilty.' And in commenting upon this instruction the court said: 'This instruction was unobjectionable, for as we have already seen, temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. But the crime to be punishable under such circumstances must take place, and be the immediate result of a fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits.'

"The only substantial difference between the law as thus pronounced, and the instruction complained of is in the omission from the latter of the qualifying clause limiting responsibility to cases of temporary insanity or frenzy. But while under different circumstances this omission might have been a serious matter, it certainly was of no consequence under the testimony in this case. There was not a syllable of evidence of the existence of settled insanity. The utmost that was claimed, or that there was the least testimony to establish, was a mere temporary frenzy or condition of irresponsibility on the part of the prisoner. There is therefore in this matter no ground for complaint.

"Error is also alleged, because of the refusal of the court to give several instructions to the jury requested on behalf of the prisoner. By the first of these it was sought to make his voluntary intoxication under certain circumstances a complete excuse for the homicide. There was no error in this refusal, for the court, as we have seen, had already charged upon this point, and laid down the law correctly, recognizing the well-known and salutary maxim of our laws, that crimes committed under the influence of intoxication do not excuse the perpetrator from punishment.' Beck's Med. Juris. 333."

In *Ingalls v. State*, 48 Wis. 647, a case of larceny, it was held competent for the accused to show that at or about the time of the crime, he was so drunk as to render it improbable that he committed it. The court said:

"We are strongly impressed with the idea that the learned judge did not fully understand the object of the offer to show the condition of the defendant as to drunkenness at or about the time the larceny was committed. As we understand the offer it was not to show that the accused was in such a mental condition as would excuse the commission of an act which would constitute the crime of larceny if committed by a sober man. It was not offered as an excuse or defense for a larceny committed, but for the purpose of showing that it was highly improbable that the accused did in fact commit the acts complained of, viz., the entering of the shop, and removing the goods therefrom; not as a defense for want of mental capacity, but as evidence tending to show that the acts which constituted the offense were not done by the accused. This object of the evidence seems to us to have been sufficiently indicated by the learned counsel for the defendant; and for the purpose so indicated we are of the opinion the evidence was clearly competent.

"The authorities cited in the brief of the learned counsel for the plaintiff in error indicate in what cases it is competent to show the intoxication of the accused upon the question of the particular intent with which an unlawful or wrongful act was done, when such intent is necessary to constitute the offense charged. None of the cases cited however have a direct bearing upon the point made in this case. It would seem however that there can be no doubt as to the right of a person accused of crime to show that at the time of its commission he was physically incapable of committing it. There can be no doubt of the right of the accused to show that he was at the time prostrated by a disease which rendered it highly improbable that he could have endured the exertion and labor necessary to commit the crime. And so we think if in this case the evidence had shown that within a few hours of the time this larceny must have been committed, the accused had been temporarily prostrated by drunkenness, so as to render it highly improbable that he could have been present at the place where the crime was committed, or if able to be present, that he could have done what the evidence shows was done by those who committed the larceny, he is equally entitled to show that fact. In such case the intoxication is not shown for the purpose of excuse or mitigation of the offense charged, but as evidence tending to show that he was not present, and did not commit the acts constituting the offense. Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime

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was committed; but certainly, in the absence of any such direct evidence, the accused may give in evidence any fact which would have a natural tendency to render it improbable that he was there, and did the acts complained of, and the fact that drunkenness was the thing which tended to prove such improbability can make no difference. If a man by voluntary drunkenness renders himself incapable of walking for a limited time, it is just as competent evidence tending to show that he did not walk during the time he was so incapable, as though he had been so rendered incapable by paralysis of his limbs from some cause over which he had no control. The cause of the incapacity in such case is immaterial; the material question is, was he in fact incapable of doing the acts charged? We cannot speculate upon the effect which the evidence, if admitted, would have had upon the verdict of the jury in this case. It was offered, apparently in good faith, as evidence tending to show that the accused could not have committed the offense. Had the drunkenness been proved so complete as to have destroyed his powers of locomotion, or so as to have destroyed the steady use of his limbs, it would have had a tendency to disprove the charge made against him. The evidence being material, it should have been admitted, and its rejection was an error for which this court is compelled to reverse the judgment."

In *Burton v. State*, 9 Tex. Ct. App. 606, the court said: "We do not propose to discuss at this time the general doctrine of drunkenness as a defense of crime embracing both act and intent. With reference to this case, and to which our remarks apply, we are of opinion that drunkenness is no defense whatever. The mere fact of drunkenness alone will not reduce to manslaughter a homicide which would otherwise be murder. The fact of being drunk, or mere mental excitement or ungovernable rage which may be engendered by drinking intoxicating liquors, will not reduce the crime of a voluntary killing below the grade of murder. *Pugh v. State*, 2 Tex. Ct. App. 539; *Farrer v. State*, 42 Tex. 265. If then drunkenness would not reduce a voluntary homicide from murder to manslaughter, neither will drunkenness reduce a voluntary assault with intent to murder to an aggravated assault and battery."

In *Gaitan v. State*, 11 Tex. Ct. App. 544, the court said: "Evidence of intoxication or drunkenness is of vital importance only in the class of offenses in which criminality depends solely or to a certain degree upon the state or condition of the mind at the time the wrongful act is done, showing the ability or inability of the mind to form or entertain a sedate or ordinate criminal design. *Ferrell v. State*, 43 Tex. 503; *Scott v. State* (present term). Such evidence may be essential in determining the degrees of murder, or in showing total want of criminal intention, and consequent immunity from any responsibility whatsoever. *Colbath v. State*, 2 Tex. Ct. App. 391."

In *Scott v. State*, Tex. Ct. App., March 29, 1882, it was held that drunkenness may be shown in order to determine whether any or what particular crime was committed by the accused; but if committed, though the party may have been ever so drunk (short of delirium tremens), it can be no excuse or justification.

In *Harvey v. State*, Georgia Supreme Court, March 21, 1883, it was held that a charge that voluntary drunkenness was no excuse for crime, and would not reduce the killing from murder to any lower grade of homicide, but that it was a fact that might be considered like any other fact, to shed light, if it could do so, on the transactions, goes as far as has been authorized by any of the rulings of that court. To be too drunk to form an intent to kill, one must be too drunk to form an intent to shoot. *Marshall v. State*, 59 Ga. 154. "The presumption that the man intends, not only the deed he does, but the natural and proximate consequences of the deed, is in criminal law as applicable to the drunken man as to the sober man." *Id.*

In *State v. Thompson*, 18 Nev. 144, at the instance of the district attorney the court gave the following instruction to the jury: "It is a well-settled rule of law that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose it must be received with caution."

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The court said on review: "An eminent writer upon criminal law thus states the established principles upon the subject: 'Settled insanity produced by intoxication affects the responsibility in the same way as insanity produced by any other cause. Temporary insanity produced immediately by intoxication does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily intoxicated. While intoxication *per se* is no defense to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of it is material for the purpose of determining the precise degree.' Whart. Homicide, § 587 *et seq.* Another author says: 'When a man voluntarily becomes drunk there is the wrongful intent; and if while too far gone to have any further intent he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is therefore a legal doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence. It is so even when the intoxication is so extreme as to make the person unconscious of what he is doing, or to create a temporary insanity.' Bish. Crim. Law, § 400.

"In *United States v. McGlue*, 1 Curtis C. 13, the court say: 'If a person suffering under delirium tremens is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been.' " *Cornwall v. State*, 4 Cooper's Ed. Tenn. 496.

"Temporary insanity produced by intoxication does not destroy responsibility if the party when sane and responsible made himself voluntarily intoxicated."

In *Hopt v. People*, Supreme Court of the United States, October Term, 1881, it was held, that under a statute establishing degrees of crime of murder, and providing that willful, deliberate, malicious and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation. The court said:

"The defendant's fifth request for instructions, which was indorsed 'refused' by the judge, was as follows: 'Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of, or attempt to perpetrate arson, rape, robbery or burglary. The degree of the offense depends entirely upon the question whether the killing was willful, deliberate and premeditated, and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation, which, according as they are absent or present, determine the degree of the crime.' Upon this subject the judge gave only the following written instructions: 'A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself that law has never recognized it as an excuse for crime.'

"At common law indeed as a general rule voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. *United States v. Drew*, 5 Mas. 23; *United States v. McGlue*, 1 Curt. 1; *Commonwealth v. Hawkins*, 3 Gray, 463; *People v. Rogers*, 18 N. Y. 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in

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the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points, *Commonwealth v. Dorsey*, 103 Mass. 412; and in well-considered cases in courts of other States. *Pirtle v. State*, 9 Humph. 663; *Hadle v. State*, 11 id. 154; *Kelly v. Commonwealth*, 1 Grant (Penn.), 484; *Keenan v. Commonwealth*, 44 Penn. St. 55; *Jones v. Commonwealth*, 75 id. 403; *People v. Belencia*, 21 Cal. 544; *People v. Williams*, 43 id. 344; *State v. Johnson*, 40 id. 136, and 41 Conn. 564; *Pigman v. State*, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, § 20; 'No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.' Compiled Laws of Utah of 1876, pp. 563, 569. The instruction requested by the defendant clearly and accurately stated the law applicable to the case, and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury."

In *People v. Ferris*, 55 Cal. 593, it was held, that drunkenness is never an excuse for crime, except where it is continued so long, and been carried to such an excess as to produce delirium tremens, or some other form of permanent insanity; but whenever the actual existence of a particular intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act. The court said:

"The next ground of error alleged is that the court mis-directed the jury in giving at the request of the district attorney, the following instruction: 'The defendant relies upon the fact that he was drunk as an excuse for his act, and claims that he was incapable of forming a criminal intent. The same rule of law should apply in cases of drunkenness as in case of insanity; that is, was the accused at the time of committing the offense conscious that he was doing wrong? And when drunkenness is relied upon as a defense and an excuse for crime, the burden of proof is upon the defendant to establish the fact of drunkenness to such an extent as that he was not conscious he was doing wrong, and this must be established on his part by satisfactory proof.' We are of the opinion that the foregoing instruction was erroneous, as it assumes that drunkenness is in some cases an excuse for crime, and places it on the same footing with insanity. Insanity, when it reaches that degree of mental disease that the party is not capable of knowing the nature or quality of the act, or if he did know it, that he did not know he was doing what was wrong, relieves him from all criminal responsibility.

"TINDAL, C. J., in answers to questions propounded by the House of Lords to the judges (cited in Roscoe's Cr. Ev. §63), says 'that to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act, or if he did know it, that he did not know he was doing what was wrong.' This is the rule adopted in this State. *People v. Coffman*, 24 Cal. 230. The burden of proving insanity rests upon the defendant, and its existence must be satisfactorily established by a preponderance of evidence. *People v. Myers*, 20 Cal. 518.

"If therefore it could be claimed that the plea of drunkenness is the same in law as the plea of insanity, and is governed by the same rules, the instruction given by the learned judge was correct. But drunkenness, as has already been stated, is never an excuse for crime except where it has continued so long and been carried to such an excess as to produce delirium tremens, or some other form of permanent insanity. The instruction was therefore more favorable to the defendant than the rule, as we understand it, justified the court in giving; but of this the defendant cannot complain.

"In other instructions the court did however give the law correctly to the jury. The jury were told by the court that in order to find the defendant guilty of the crime charged against him they must be satisfied of his guilt from the evidence to a moral certainty, and beyond a reasonable doubt. They were further instructed that they might take into consideration the fact that the defendant was drunk at the time of the commission of the act charged, to determine the fact whether the accused was too drunk to have formed the

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criminal intent necessary to hold him responsible before the law. The eighth instruction given by the court to the jury was the following: 'If you believe that the defendant was in a state of intoxication at the time of the alleged assault, I charge you, that while drunkenness is no excuse for any crime whatever, yet as before stated, it is of very great importance in cases where it is a question of intention, and a person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence.' The above instruction was certainly as favorable to the accused as he had a right to ask. The court of its own motion proceeded to charge the jury at greater length on the question of drunkenness, and among other things charged as follows: 'No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act. * * * Evidence of drunkenness is only admitted for the purpose indicated in the preceding instruction, and may be considered by the jury as a fact bearing upon the question of the intent with which the act was done.'

"The foregoing extracts from the charge of the court below bring the case within the rule laid down by this court in the case of *People v. Williams*, 41 Cal. 341. In that case the law was stated to the jury as follows: 'It is a well-settled rule that drunkenness is no excuse for the commission of crime. Insanity produced by intoxication does not destroy responsibility, when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution.' Referring to this instruction, WALLACE, C. J., says: 'The fifteenth instruction given to the jury as to insanity produced by intoxication is correct. It is the same which was approved here in *People v. Lewis*, 36 Cal. 531.'"

On the other hand, in *State v. Tutin*, 53 Vt. 433, the court below had charged: "The voluntary intoxication of one who without provocation commits a homicide, although amounting to a frenzy, that is, although the intoxication amounts to a frenzy, does not excuse him from the same construction of his conduct, and the same legal inferences upon the question of premeditation and intent as affecting the grade of his crime, which are applicable to a person entirely sober. * * * I don't want to be misunderstood about this, and shall therefore repeat what I consider to be the law upon this point, that is, that if a party gets so intoxicated that he is crazy drunk, that it amounts to a frenzy, so that he does not know what he is doing, and if in such condition he should commit a crime, which, if committed by a sober man would be murder, it is equally murder in the man that is thus drunk." On review the court observed:

"There is perhaps no principle or maxim of the common law of England more uniformly adhered to than that voluntary drunkenness does not excuse or palliate crime. Lord Coke, in his institutes, declares that 'whatever hurt or ill he doeth, his drunkenness doth aggravate it.' 8 Thomas Coke Lit. 46. And in his reports, *Beverley's case*, 4 Coke, 123b, 1251, he says: 'Although he that is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offense, nor turn to his avail.' And Sir Matthew Hale, eminent alike for his humanity and learning, says of drunkenness, which he calls *de mensis infirmitas*, 'This vice doth deprive men of the use of reason, and puts many men in a perfect but temporary frenzy; * * * but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses.' And Lord Bacon, in his 'Maxims of the Law' (Rule 5), in that comprehensive language which clearly defines and gives the reasons for the rule of law, thus asserts the doctrine: 'If a madman commit a felony he shall not lose his life for it, because his infirmity came by act of God; but if a drunken man commit a felony, he shall not be excused, because the infirmity came by his own default.' In *Burrow's case*, Lewin, 75, A. D., 1833, HOLROYD, J., thus defines the rule: 'It is a maxim in the law that if a man gets himself intoxicated he is answerable to the consequences,

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and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong.' And the cases of *Rea v. Griddle*, and *Rea v. Menkin*, 7 C. & P. 297, show the uniformity of this rule in the courts of England. In the case of *People v. Rogers*, 18 N. Y., the Supreme Court had reversed the conviction of Rogers on the ground that the court had excluded the evidence of the respondent's drunkenness as affecting the criminal intent. But the case was by writ of error carried to the Court of Appeals, and the whole law upon that subject was reviewed and canvassed with great learning and ability by Chief Justice DENIO and HARRIS, J. HARRIS, J., says: 'The Supreme Court seem to have understood that in all cases where without it the law would impute to the act a criminal intent, drunkenness may be available to disprove such intent. I am not aware that such a doctrine has before been asserted. It is certainly not sound. The adjudications upon the subject, both in England and this country, are numerous and characterized by a singular uniformity of language and doctrine. They all agree that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime.' But it is insisted that under the statute which makes 'degrees' of murder, drunkenness qualifies and mitigates the higher offense. The statute declares that 'all murder which shall be perpetrated by means of poison, or by lying in wait, or any other kind of deliberate and premeditated killing, * * * shall be deemed murder in the first degree.' The same or similar statute has been enacted in most of the States. And many courts have allowed drunkenness to be shown in mitigation of the higher offense. In the case of *State v. Jackson*, 40 Conn. 136, the court held that intoxication, as tending to show that the prisoner was incapable of deliberation, might be given in evidence. Chief Justice SEYMOUR dissented, and FOSTER, J., who tried the case below, did not sit, so that the four judges constituting the court were in fact equally divided. The same case came before that court again in 41 Conn. 534, and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation, and declared that 'we have enunciated no such doctrine,' but 'held on a trial for murder in the first degree, which under our statutes requires actual express malice, the jury might and should take into consideration the fact of intoxication as tending to show that such malice did not exist.' And in the same opinion the judge says: 'Malice may be implied from the circumstances of the homicide. If a drunken man take the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice. Intoxication therefore so far from disproving malice, is itself a circumstance from which malice may be implied. We wish therefore to reiterate the doctrine emphatically that drunkenness is no excuse for crime; and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil-disposed persons, will receive the sanction of this court.' This reasoning seems to us both illogical and incongruous. To constitute murder of the first degree the act must indeed be done with malice forethought. And that malice must be actual, not constructive. At common law if the accused shoot his neighbor's fowls, and by accident kill the owner, he is guilty of murder, yet he did not intend to murder, but to steal. Such cases are excluded by the statute from the definition of murder in the first degree. But 'where the act is committed deliberately with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural and probable effect of any act deliberately done was intended by its actor.' 2 Am. Crim. Law, 911. 'And intent for an instant before the blow is sufficient to constitute malice.' Id. 913. It will be admitted that if the respondent had killed his victim 'by poison, or lying in wait,' the act would have been murder in the first degree, and the fact that he was intoxicated could not have been admitted, to excuse or palliate the crime. Yet it is claimed that if the circumstances show that the murder was deliberately planned, and executed with fiendish barbarity and malice, drunkenness may come in to palliate the crime.

"This we think is making a distinction without a difference. Chief Justice HORNBLOWER

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1 Am. Crim. Law, § 1103, speaking of the New Jersey statute, which is like ours, says: 'This statute in my opinion does not alter the law of murder in the least respect. What was murder before its passage is murder now — what is murder now was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases, or rather it prescribes that in certain specified modes of committing murder the punishment shall be death, and in all other kinds of murder the convict shall be punished by imprisonment.'

"The evidence so far as detailed in this case, if believed, shows a murder most fiendish and shocking. He destroyed the last resisting vitality of this woman, struggling for her life, with an axe, which shows malice and malignity of purpose. The language of Chief Justice McKAY, while discussing a like statute in Pennsylvania, and in a case quite similar to this is fitting and sensible. He says: 'It has been objected that the amendment of our penal code renders premeditation an indisputable ingredient to constitute murder in the first degree. But still it must be allowed that the intention remains as much as ever the true criterion of crime in law as well as in ethics; and the intention of the party can only be collected from his words and actions. * * * But let it be supposed that a man without uttering a word should strike another on the head with an axe, it must on every principle by which we can judge of human actions, be deemed a premeditated violence.' The statute has in no degree altered the common-law definition of murder. But the killing a human being by poison, or lying in wait, or by purposely using a deadly weapon to that end is murder in the first degree; and the purpose and intent to kill must be determined by the circumstances that surround each case for the murderer takes with him no witnesses, and does not often avow his purpose.

"Where the requisite proof is adduced to show a wicked, intentional murder, he is not permitted to show a voluntary and temporary intoxication in extenuation of his crime."

In *State v. Welch*, 21 Minn. 23, it was held that in an indictment for voting more than once at the same election, it is no defense that the prisoner was so drunk when he cast his second vote that he did not know what he was doing, and did not remember that he had already voted at the same election. The court said:

"The defendant's intoxication is relied on as a defense, first, as rendering the defendant incapable of forming the intent to commit a crime; second, as rendering him ignorant of the fact that he was doing the act for which he is indicted. His counsel insists that 'the essence of an offense is the wrongful intent, without which crime cannot exist.' This is true: but in cases like the present, where the law declares the act done by the defendant to be a crime, the only question is, did the defendant intend to do the act which the law has forbidden? He does not appear to have cast his vote by accident, or under the constraint of superior force. His act was and must have been wholly voluntary. Every man is conclusively presumed to intend his own voluntary acts. As the defendant must have intended to cast the second ballot, he must have intended to commit the offense charged.

"The cases cited by his counsel, except one in California, are cases where the crime of which the prisoner was accused consisted not merely in the doing of an act, with intent simply to do that act, but in the doing of an act, with intent thereby and by means thereof to compass a criminal end, to accomplish an unlawful purpose. Thus in prosecutions for larceny the act of the prisoner — the mere taking — does not constitute the offense, but the act coupled with the intent to steal; and the question is not, did the prisoner take and intend to take the goods? But did he take them *animo furandi*? So in trials for murder in the first degree the question is not merely, did the prisoner intend to inflict the blow (or do any other act), which resulted in death? But had he a premeditated design to effect the death by means of the act done? And in *State v. Garvey*, 11 Minn. 134, the question was not did the prisoner intend to make the assault? But did he also intend to do great bodily harm? In such cases, where the crime consists not alone in the act done and intended to be done, but also in the intent of the prisoner to effect certain results by means of the act, courts have sometimes admitted evidence of the prisoner's intoxication, as affecting his mental condition, and the possibility or probability of his forming a premeditated design, or even an intention to perpetrate, by means of

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the act done, the crime wherewith he is charged. *Swan v. State*, 4 Humph. 126; *Pirth v. State*, 9 Id. 663; *State v. Schingen*, 20 Wis. 74; *State v. Bell*, 20 Iowa, 316; *Roberts v. People*, 19 Mich. 417, where many cases are collected; and see *State v. Gut*, 13 Minn. 361.

"So in another class of cases—for instance, prosecutions for passing counterfeit money—where the prisoner's knowledge of its falsity is of the essence of the offense, he has been permitted to show, that when he uttered the money, he was so drunk as not to know that it was counterfeit. *Pigman v. State*, 14 Ohio, 555.

"But it is obvious that such cases have no analogy to the case at bar. This defendant's motive and purpose in voting are alike immaterial. His offense is the same, although his two votes were cast for opposing candidates, so that the second neutralized the first. Here the only question is did the defendant, having voted in the first ward, intend to vote a second time at the same election? In no case can a defendant, by proof of intoxication, rebut the legal presumption that he knows and intends his voluntary acts. In the instances above cited, the prisoner cannot show, that by reason of his intoxication, he did not intend to take the goods he is charged with stealing; to strike the blow which resulted in death; to pass the money which proved to be counterfeit; nor can he show, that by reason of his intoxication, he did not know that he took the goods, struck the blow, or passed the money.

"It is claimed that the defendant was so drunk when he voted the second time that he did not remember that he had already voted, and that the act was innocent, because done in ignorance of this material fact. But this plea of want of memory is like those of want of intent and want of knowledge. The defendant had cast his first vote but a few hours before. In the ordinary course of things had he remained sober it would be no excuse for his offense that he had forgotten, at three o'clock in the afternoon, that he had voted in the morning. It is not pretended that he is not a man of ordinary memory, and he must be held to the reasonable exercise of the power of memory that he possesses. A man is not the less responsible for the reasonable exercise of his understanding, memory and will, because he has enfeebled his memory, perverted his will, and clouded his understanding by voluntary indulgence in strong drink. A drunken man equally with a sober man is presumed to know and intend the acts which he does, and to remember the acts which he has done. There is accordingly no reason why this case should form an exception to the general rule of the criminal law, that 'an intoxicated man shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses.' Hale P. C. 22; 1 Bish. Cr. L. § 499, and cases cited; *People v. Carbutt*, 17 Mich. 19.

"In *People v. Harris*, 23 Cal. 673, cited by the defendant's counsel, the prisoner was indicted under a statute similar to our own for the offense of which this defendant stands convicted. It was held that evidence of his intoxication should be admitted upon the question of his intent to commit a crime, and whether a crime had in fact been committed; but the opinion was strongly expressed, and often reiterated, that 'a state of intoxication can be of no avail as an excuse for crime. It seems to us that a prisoner would have no need of an excuse for an act which his intoxication made innocent and no crime. There can be no practical difference in the result between holding that intoxication is an excuse for crime, and holding that the acts of a man sufficiently intoxicated cannot be criminal. In either case a man would be exempted from criminal responsibility for acts done in a state of voluntary intoxication. This doctrine is novel, anomalous and startling. It is a dangerous innovation upon the well-established principles of the criminal law, and we have no hesitation in rejecting it.'"

CASES
IN THE
SUPREME COURT.
OF
ILLINOIS.

WIEGLEB V. THOMSEN.

(108 Ill. 156.)

Bankruptcy—conveyance in contemplation of.

A conveyance of real estate to a purchaser in good faith and for value by one contemplating bankruptcy and afterward becoming bankrupt, is valid as against a purchaser from the assignee.

BILL to set aside deeds. The opinion states the facts. The bill was dismissed below.

Eugene E. Prussing, for plaintiffs in error.

E. A. Sherburne, for defendants in error.

MULKEY, J. On the 10th of August, 1878, Rudolph Schlösser, subject to certain incumbrances, was the owner in fee of nine lots in the city of Chicago, this State, worth some \$30,000, being the same involved in this litigation. On that day he and his wife, by warranty deed, conveyed six of them to defendant in error G. F. T. Hoffman, and by a like deed on the same day conveyed the three remaining lots to defendant in error F. W. J. Thomsen. On

the 29th of the same month Schlösser filed in the District Court of the United States for the Northern District of Illinois, his petition in bankruptcy, in pursuance of which he was subsequently, on the 7th day of September, 1878, duly adjudged a bankrupt by said court, and one Robert E. Jenkins was thereupon appointed his assignee in bankruptcy. By virtue of an order of the District Court, the lots in question were, on the 10th of June, 1879, sold by the assignee at a regular bankrupt sale, and the same were struck off to plaintiff in error, Emilie Wiegleb, for the very inconsiderable sum of \$200, and the premises were thereupon conveyed to her by the assignee in pursuance of the sale. By this conveyance plaintiff in error acquired whatever title or interest Jenkins had in the premises as assignee of Schlösser, and nothing more. On the 26th day of June, 1879, plaintiff in error filed the present bill in the Circuit Court of Cook county, against Hoffman and Thomsen and their several tenants, by which it is sought to have set aside as fraudulent and void, and as a cloud upon the title of plaintiff in error, the above mentioned conveyances from Schlösser to Hoffman and Thomsen.

The *gravamen* of the complaint of plaintiff in error, as appears upon the face of her bill, is that these conveyances were made by Schlösser in contemplation of bankruptcy, and for the manifest purpose of preventing his estate from being distributed among his creditors under the Bankrupt Act, and that the grantees, Hoffman and Thomsen, knew at the time of accepting these conveyances from him, that such was the object and purpose of Schlösser in making them. These charges were distinctly denied by the answer of defendants in error, and to the issues thus formed most of the testimony was directed. On a hearing upon the merits, the Circuit Court found the issues for the defendants in error, and thereupon entered a decree dismissing the bill of plaintiff in error, to reverse which decree the present writ of error is prosecuted.

It is quite clear that at the time of these conveyances to Hoffman and Thomsen, Schlösser was insolvent, and on the very verge of bankruptcy, and we think the weight of evidence shows that they were made, so far as he is concerned, in contemplation of bankruptcy, and in fraud of the Bankrupt Act, and while there are some established facts which tend strongly to show that Hoffman and Thomsen knew the suspicious circumstances under which the conveyances were made, and Schlösser's object in making them, yet

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we do not think the evidence sufficiently strong in this direction to warrant us in disturbing the decree of the Circuit Court on that ground. In view of the fact that the evidence on that phase of the case was conflicting, and in the main consisted of oral testimony, the opportunities of that court were, as has often been said under like circumstances, far better than ours in arriving at a just conclusion on that question. It is only when this court is able to say under such circumstances, that the judgment or decree of the court below is clearly against the weight of the evidence, that it is authorized to reverse upon a mere controverted question of fact.

Conceding then that Hoffman and Thomsen were purchasers in good faith for valuable considerations, which the Circuit Court must have found to warrant its decree, the bill of plaintiff in error cannot on any other theory be maintained. It follows therefore the decree of that court dismissing the bill was proper, whatever may be the true solution of other questions discussed by counsel.

Decree affirmed.

MOSHIER V. SHEAR.

(108 Ill. 169.)

Arbitration and award — misconduct of arbitrator.

It is sufficient ground for setting aside an award, that one of the three arbitrators, after his appointment, conversed fully on the merits of the dispute with one who had previously acted as arbitrator in respect to the same matters and whose award had been set aside.

BILL to set aside an award. The opinion states the facts. The prayer was granted by the trial court, but this was reversed by the Appellate Court.

Lawrence, Campbell & Lawrence and Sanford & Carney, for plaintiff in error.

McKenzie & Calkins, for defendant in error.

WALKER, J. The parties to this record had business transactions running through a number of years, and being unable to adjust

their differences, they agreed to submit them to the award of three arbitrators. They were duly selected, and heard the evidence and the parties, and found and published an award that plaintiff in error pay to defendant in error \$1,100. By agreement this award was set aside, and the matters again submitted to the award of Henry Sisson, John Becker and Jonathan Hubbell. After a hearing of the witnesses they published an award that plaintiff in error pay to defendant in error \$704.62. Thereupon Moshier filed this bill to set aside the award and enjoin its collection.

The bill alleges several grounds, among which is the charge of misconduct of Hubbell, one of the arbitrators. It charges that he, after being selected to act, saw Stephens, who had been one of the arbitrators when the case was previously tried, and was fully informed as to all of the particulars of the controversy, and talked freely with him in reference to the case, that Hubbell was thereby prejudiced, and rendered incompetent to act as an arbitrator, that plaintiff in error was not informed of the fact, nor did he learn it until after the award was executed and published. He charges that by reason of the misconduct of this arbitrator he was greatly injured and wronged. On a hearing in the Circuit Court it was found that the arbitrator was incompetent to act, the award was not for that reason binding, and the court decreed that it be vacated and set aside. Thereupon Shear appealed to the Appellate Court for the Second District, where the decree was reversed, but the case was not remanded to the Circuit Court, whereby its decree is final. Thereupon Moshier prosecutes error, and urges a reversal of the decree of the Appellate Court.

In the view we take of this case it becomes necessary to consider but one question, and that is whether the misconduct of Hubbell was such as to require the award to be set aside and vacated. That his having a full, free and unrestricted conversation with Stephens, who was fully informed as to all of its details, was misconduct, is not denied. After being selected, it is the duty of an arbitrator, like a juror, to act fairly and impartially between the parties, and on the evidence adduced before them on the trial, and entirely independent of all outside influences, and what will be misconduct on the part of a juror will, as a general rule, be such on the part of an arbitrator. Neither has a right to learn facts, except as brought to his attention on the trial. It is gross misconduct for either to seek evidence or the opinions of others in regard to the case, or

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any thing material to its decision in another mode. It is virtually conceded that had defendant in error conversed with the arbitrator, the award being in his favor, it would have been set aside on the presumption that it was obtained by improper influence, and the same would be equally true had an agent or the attorney of defendant in error conversed with the arbitrator in reference to the controversy.

Stephens testifies that Hubbell was at his house, and they conversed in reference to the former arbitration. He did not remember whether Hubbell inquired in reference to it, as he voluntarily introduced the subject; that the matter was talked over, and he informed Hubbell what items they allowed, and what they rejected; that he told him they allowed Shear only such items as were corroborated by evidence of other persons. Rice said to Hubbell that Moshier believed that his mind was made up through the influence of Stephens. He replied he did not think Stephens intended to influence him. He did not say he was influenced by what Stephens told him.

In his testimony Hubbell says he had known Stephens twenty years prior to the conversation, and their relations had been friendly, and he held him in high esteem; that he went to his house in the evening — they had three or four hours' conversation that evening. "We talked a good deal about it, but I don't recollect that he gave me a full account of the case, or I will say further that it was talked about freely — nothing was kept back for delicacy."

It is true that there is no positive proof that the arbitrator was influenced in his opinions by the conversation, but we have no reason to expect such proof in such cases. However much he may have been influenced, it is scarcely probable that he would be aware of the fact. Such effects are seldom perceptible or consciously produced. They are usually imperceptible, and unknown to the subject of their influence. However honest and upright Hubbell may be, and however he may feel free from influence produced by his conversation with Stephens, still it is almost impossible to believe that such a conversation with a friend of long standing, and for whom the arbitrator had a high regard, did not produce strong, if not controlling, convictions on his mind, and however desirable it may be to terminate protracted contention, it is more desirable that justice shall be administered free from all improper or corrupting

influences — that the mode of settling contests by arbitration shall be kept pure and free from improper influences. Here, whatever the motive of the arbitrator, he was subjected to improper influences, and whether or not it operated to the injury of plaintiff in error, it was calculated to operate to the prejudice of the parties, and to sanction it would form a dangerous precedent. We cannot know what influence it may have exerted in this case. It is sufficient that it was calculated to produce improper results.

To sustain this award would be to sanction and justify the means by which the whole system of arbitration would be perverted and corrupted. If we hold that the party thus objecting must prove that undue influence actually resulted, then the objection would seldom be available however corrupt the influence. Such things can seldom, owing to precautions taken by those engaged in such practices for concealment, be shown by positive evidence, hence the safer rule is, to hold that when it appears there has been conduct calculated to result, and which has probably resulted perniciously, to set aside the award. It is clear that had Shear done what Stephens did, or had he procured another to do the same thing, there could not have been the slightest hesitation in setting aside the award, and yet the influence of Stephens was equal to if not more potent than that of Shear would have been on the mind of the arbitrator, who was his intimate friend and whom he held in high esteem. What more powerful influence could have been exerted? If we sustain this award we shall license every person, whether a partisan or not to the contest, to enter into the conflict, and exercise his full influence, whether inspired by friendship or hatred of the parties to the contest, only excluding the unseemly and improper conduct of the parties themselves, their attorneys or agents. We must therefore hold that the conduct of Hubbell was improper to an extent that rendered him incompetent to act in the case.

It is however urged that the submission was to three arbitrators named, or to any two of them, and the award published by the three, or any two of them, should be binding on the parties to the submission, and that it was signed and published by all three, and hence the award is made and published by two of the arbitrators, against whom there is no charge of misconduct of any kind. This reason is more apparent than real. The misconduct of a juror has always been held ground for setting aside a verdict, notwithstanding

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the other eleven concurred with him in the finding, and it is because it is impossible to know the extent of his influence over the minds of the other jurors, and because that fact is incapable of proof and cannot be known, the courts, to avoid the probability that the misconduct of one has influenced the others to keep the stream of justice certainly pure, will set the verdict aside. So here no one can know the extent of Hubbell's influence over the minds of the other two. For aught we can know it may have controlled in making up the award that was published. Plaintiff in error had the right to have all who acted free from bias and improper influences produced after their selection. Had but the other two acted then we can see no objection to the award. But all of the members who did act were not free from improper influences, and he was thus deprived of an essential right secured to him by the law, and for that reason the award should be set aside, and the Circuit Court committed no error in the decree it rendered, but the Appellate Court erred in reversing it.

The decree of the latter court is reversed, and the cause remanded.

Decree reversed.

McCORMICK V. MILLER.

(102 Ill. 208)

Fraud—procuring of conveyance.

Where one procures a deed of real estate from the owner, without consideration, and knowing the true ownership, the grantor supposing the grantee to be the true owner, the conveyance will be set aside in equity as between the parties.

BILLS to set aside deeds. The opinion states the facts. The plaintiff had judgment below.

Daniel R. Sheen, for appellant.

R. P. Sloan and J. W. Cochran, for appellee.

MULKEY, J. On the 19th day of August, 1878, Caroline Miller and Anna Fredericks filed in the Peoria county Circuit Court their respective bills in chancery, against Charles McCormick, John

Birks, Maria M. Birks, John Hawkins, and Daniel R. Sheen, to set aside certain conveyances of real estate situate in Peoria county, this State. John Birks and Maria Birks answered, admitting the material facts alleged, and also filed a cross-bill, setting up substantially the same state of facts charged in the original bills, and praying similar relief. The cases were subsequently consolidated, and the other defendants answered the original bills, denying the main facts relied on for relief.

It appears that the land in controversy formerly belonged to Kitridge D. Earl, being certain portions of lots 2, 4 and 6, in block 19, in the city of Peoria; that Adeline H. Earl, his wife, at the same time owned other portions of the same lots; that on the 30th day of April, 1850, Earl conveyed the portions of these lots owned by him to David Sanborn, in fee, in trust for his wife, for life, with remainder in fee to his daughter, Maria M. Earl, now Mrs. Birks; that on the 4th of August, 1863, Earl died, leaving a last will and testament, by which he devised his entire estate, both real and personal, to his wife, for life, giving her full power to sell and convey the same, at her discretion, and limiting the remainder, in so much of the estate as should be undisposed of at the time of her decease, to his daughter, Mrs. Birks; that on the 25th of July, 1865, Adeline H. Earl, supposing herself, by virtue of her husband's will, to be the absolute owner of the entire premises, for the consideration of \$6,500, conveyed, by warranty deed, to George A. Beseman certain parts of these lots, including the same portions theretofore conveyed by her husband to Sanborn in trust for herself and daughter; that Beseman subsequently became insane, and Peter Schertz was appointed his conservator, who, in 1868, under an order of court, sold at public sale the premises last above mentioned, one portion of which was struck off to George Fredericks, at \$3,600; and the residue to Augusta Beseman, for the consideration of \$4,450; that in pursuance of their respective purchases the conservator conveyed to George Fredericks on the 22d of September, 1868, and to Augusta Beseman on the 15th of June, 1870; that on the 20th of June, 1870, Augusta Beseman, for the consideration of \$2,000, sold and conveyed to appellee Caroline Miller, a part of the same premises purchased by her of the conservator, as just stated, and being a part of the land now in controversy; that in consideration of \$4,000, George Fredericks, on the 17th of December, 1872, conveyed the part of the premises purchased by him

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to I. C. Edwards, who, for a like consideration, on the 27th of the month, conveyed the same to appellee Anna Fredericks, being the residue of the premises in controversy; that on the 4th day of April, 1878, Birks and wife, for the consideration, as expressed in the conveyance, of one dollar, "and other considerations," by quitclaim deed, conveyed a part of the premises in controversy to appellant, Charles McCormick, and on the 9th of the same month, by a similar deed, for a like consideration, conveyed to him the residue; that on the 17th of July, 1878, McCormick, for the consideration as expressed in the deed of \$7,000, sold and quitclaimed the entire premises to John Hawkins, and took a deed of trust on the property conveyed to secure the purchase-money, which was payable in three installments, the last maturing four years from the date of the transaction; that all the foregoing conveyances were duly recorded in the recorder's office of Peoria county, and the property in each of them is described by metes and bounds; that prior to the conveyances from Birks and wife to McCormick he had intermarried with Augusta Beseman, Beseman having in the meantime died.

So far there is no controversy about the facts; but it is claimed by appellees that while they all supposed that Mrs. Miller and Mrs. Fredericks had acquired, through *mesne* conveyances from Adeline H. Earl, absolute fee simple titles to their respective premises, they had in truth and in fact only acquired her life estate, and that Charles McCormick, with full knowledge of the defect in the titles, and also of their ignorance of such defect, by means of fraudulent concealment and false and fraudulent representations, obtained the two quitclaim deeds above mentioned from Mrs. Birks and her husband, whereby he obtained from her the remainder in fee in the premises which she acquired by virtue of the trust deed from her father to Sanborn, in April, 1850, as heretofore stated.

There are other facts and interests involved in this suit which are settled by the decree, but it is not important to note them here, as McCormick alone has appealed. So far as he is concerned, the important inquiry is, were the conveyances from Birks and wife to him obtained under such circumstances as will require a court of equity to set them aside as fraudulent and void?

While courts of equity do not sit to enforce mere moral rules, whose only sanction is found in public opinion, yet it is a part of their mission to see that common honesty, good faith and fair deal-

ing shall be observed in the ordinary business affairs of life. Public and private interests alike demand this should be done. The Circuit Court, by its decree, finds this just and wholesome rule was not observed by appellant in obtaining conveyances of this property, and the question now to be determined is, does the evidence warrant that finding. The decree of the Circuit Court is of itself certainly entitled to some consideration by this court on a mere question of fact like this, without any special regard to the evidence which supports it. By this we mean the finding of the lower court ought never to be disturbed upon a mere question of fact, unless some good reason for doing so is clearly apparent. If upon a careful consideration of the whole of the testimony bearing on the question, the reviewing court has a well founded doubt as to how the question should have been determined, without any clear conviction the one way or the other, the finding of the court below should not be disturbed.

Testing the case before us by this rule, it is difficult to perceive how it can reasonably be contended the present decree ought to be reversed on the facts. Whatever may be said with reference to other controverted questions of facts, we do not think it admits of a reasonable doubt, in the light of all the evidence in the case, that appellant, at the time of obtaining the conveyances in question, knew the fee of the property in controversy was in Mrs. Birks, and also knew at the same time, that she and her husband were ignorant of that fact. This being so the parties were not negotiating on equal terms. Appellant was deliberately withholding a fact within his knowledge, unknown to the other contracting parties, vitally affecting the proposed contract, which common honesty and fair dealing required him to disclose, and this of itself was such a fraud upon their rights as vitiates the whole transaction. And it is no sufficient answer to say the Sanford deed was on record, and appellees are presumed to have had notice of its contents; for this at best is but a presumption, which is not in a case like this at all conclusive on the parties, and the question therefore is, has this presumption been overcome by rebutting testimony? That it has, we have not the slightest doubt.

If this were a controversy between appellees and an innocent purchaser from appellant, the record in such case would be conclusive upon appellees; but such is not the case. If any consideration had been paid by appellant for the valuable estate conveyed to him by

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Birks and wife, the amount doubtless would have been stated in the deeds. This is the usual course in such transactions, and there are a number of good reasons for it, which we will not stop to enumerate. The very statement in these deeds with respect to the consideration, when tested by common experience in matters of this kind, affords the strongest evidence they were executed without consideration, and this is in perfect accord with the account given by Stephens and Birks of the affair. It is evident from their testimony these deeds were executed through mere kindness to McCormick, to enable him to make a loan on property in which neither Mrs. Birks nor her husband supposed they had the slightest interest — to satisfy a mere whim of the lender, as they were told. From their testimony, and all the circumstances in the case, we are fully satisfied the only inducement or consideration for the conveyances was a desire on the part of Birks and his wife to do McCormick a kindness, and to now permit him to take advantage of it in the manner he proposes, would be the grossest injustice.

[Omitting some subordinate considerations.]

Decree affirmed.

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY V. CRANE.

(108 ILL. 249.)

Corporation — foreign — garnishment of — demand.

A foreign corporation, doing business in Illinois and having property there, may be garnished there, and no previous demand is necessary.

GARNISHMENT. The opinion states the case. The plaintiff had judgment below.

Marsh & McFadon, for appellant.

Emmons & Wells, for appellee.

WALKER, J. This was an action by attachment, brought before a justice of the peace of Adams county, by Chauncey Ladd, a resident of this State, against one Crane, a resident of the State of Missouri. No property of Crane being found, the Hannibal and St. Joseph Railroad Company was summoned as a garnishee. The

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company filed an answer on the return day of the writ of attachment. The justice of the peace issued a *scire facis* against the company, and on the return day the company filed a second answer, and the justice of the peace thereupon rendered a judgment against the company, in favor of Crane, for the use of Ladd, for \$17.72. From that judgment the company appealed to the Circuit Court, where the judgment of the justice of the peace was affirmed. An appeal was prosecuted to the Appellate Court, and the judgment being affirmed, the case is, on a certificate of the judges of that court, under the statute appealed to this court.

The material facts of the case are, that the Hannibal and St. Joseph Railroad Company is a company organized under the laws of the State of Missouri, and has its general office and principal place of business in that State, as required by law, and its railway tracks are wholly in the State of Missouri. The railway company, before and at the time of suing out the attachment, and the service of the garnishee summons, ran its trains regularly into the city of Quincy, in Adams county, over and across the bridge at that place. The company then, and previous to that time, kept an agent in the city, and received freight and passengers for transportation over its road, and the company then had personal property in the city, to-wit: engines and cars. The company by its answer, admits an indebtedness to Crane, but denies it held any property of his in possession or under its control.

These are the conceded facts, and the object of this appeal is, to determine whether a corporation of another State, doing business and having property in this State, may be garnisheed for a debt it owes to a resident of the State of its domicile, in the courts of this State. The question is presented for the first time in this court.

It is familiar law that when a corporation is created it becomes an artificial person, and may perform all acts and claim all rights with which it is empowered and endowed by its charter, and it may within the scope of the powers thus conferred and duties imposed, like a natural person, acquire rights and incur liabilities precisely as a natural person. If so empowered, it may contract debts, purchase, sell and enjoy property; and it is not denied in this case that this company was empowered to contract the debt, and that it owed the money to Crane. It then for the purposes of this suit must be regarded as a person capable of owning property, and of being indebted, and liable to be sued for its indebtedness. If this be true,

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it must be treated the same, in all respects, as a natural person placed in the same situation. This, we think, will not be contested, as we are aware of no law giving such bodies pre-eminence or special privileges over natural persons. Suppose a merchant in Missouri, transacting his principal business there, had located a branch in Quincy, in this State, and the agent of that branch had been garnisheed for a debt his principal owed his chief clerk or book-keeper in the principal place of business, could the garnishee process be sustained in such a case? If so then it must lie against this railroad company.

In this and the supposed case, the artificial and the natural persons are both non-residents, both owe an employee who is indebted to a non-resident of the State of their domicile, are both doing a branch or collateral business at the place of the residence of the creditor of their employees, and we will suppose that in both cases that creditor sues out an attachment against their several employees, and garnishee summons is served on their several agents. Can any person, without extreme refinement and impalpable distinctions, say that the one proceeding should be sustained and the other defeated? It would seem on principle that no reasonable or justifiable distinction could be made. Then would a natural person be liable to this process under these circumstances? We feel confident that he would, on a fair construction of our attachment law, if not on precedents giving construction to substantially the same kind of statutes in other States.

It can not be contested that had the attachment been against the railroad company, its property in the county might have been levied on under the writ, and all persons owing the road, or having property, effects and choses in action belonging to the road in their hands or possession, might have been garnisheed; and there can scarcely be a doubt that the road might have been sued, and the service had on the agent at Quincy, so as to have given the court jurisdiction. Such a service on such an agent of a domestic corporation, we presume, none would have questioned as being sufficient.

In the case of *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9, it was held the act providing for service of process on corporations was not confined to domestic corporations — that it was passed to embrace corporations having property in this State and their officers and places of business in another State — and this has been the received construction ever since.

In *Peoria Ins. Co. v. Warner*, 28 Ill. 429, it was held this was a remedial statute, and should be most liberally construed. It does not require a liberal construction to bring foreign corporations within the act. The provision is, that "in all cases where suit has been or may hereafter be brought against an incorporated company, process shall be served." Language more comprehensive could scarcely have been employed. It says any corporation, without the slightest reservation or limitation. A thing may be embraced in the provisions of a statute by being specifically named, or by being embraced in a class that is named. Here the class named is all corporations, and when the statute says any corporation, appellant being an individual corporation, it comes within the provision as fully as had its name been employed specifically in the statute. It would have been no more comprehensive had it said all corporations of every kind, whether domestic or foreign, doing business in this State.

In *Mineral Point R. R. Co. v. Keep*, *supra*, and in *Midland Pacific Ry. Co. v. McDermid*, 91 Ill. 170, it was expressly said that the section applied to and embraced foreign, as well as domestic corporate bodies doing business in this State. In the latter of these cases the plea was that the railroad was a Nebraska company, doing business alone in that State, and the plea averred that the company had no property, nor did they transact any business or have an agent, in Illinois. It was on this last averment the case was decided in favor of the railroad company. Nor is this rule lacking the support of precedent. It has been held in other tribunals that a foreign corporation, by establishing an agency in another State, thereby so far becomes an inhabitant of the latter State as to become subject to the process of its courts (*Fithian v. New York & Erie R. R. Co.*, 31 Penn. St. 114; *McAllister v. Penn. Ins. Co.*, 28 Mo. 214, and *Brauser v. N. E. F. Ins. Co.*, 21 Wis. 506), and the doctrine is reasonable and just. If a foreign corporation is so far an inhabitant in a State into which it comes, as to transact its business, it should be so far held an inhabitant as to be sued and served with process on the officer who transacts its business, and the statute has so provided. Section 26, chap. 32, Rev. Stat. 1874, entitled "Corporations," subjects foreign corporations to all of the liabilities, restrictions and duties that are imposed on like corporations of this State. One of the liabilities of corporations organized under the laws of this State is, to be sued by service on an officer or agent,

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and if the liability of foreign bodies is in all respects the same, then they may be sued and served with process in the same manner. No one will deny that our corporations may be garnisheed, and the process served on an officer or an agent transacting their business; and if so, it must follow that a foreign corporation is under the same liability. The language of the provision is broad enough to embrace this corporate body in this liability, and there is nothing to exclude it from this or any other liability. The legislature had the power to impose it, and the courts must enforce it, and there is neither injustice nor hardship in complying with the requirement.

If then the transaction of such business and the location of such an office in this State, by a corporate body of another State, authorizes a service that would bind such a body on a judgment rendered against it, why will not such a service bind it as a garnishee? No distinction has been taken in argument, or reason assigned, nor is any perceived. The fifth section of the practice act says process, and it must mean all process, as no exceptions are specified or otherwise made. It would therefore seem to embrace all process. This garnishee summons is process, and is therefore within the terms of the statute, nor has any sufficient reason been shown for taking this class of cases out of its operation. It is true that a number of cases of highly respectable courts of other States giving construction to their statutes are referred to as having a bearing on this question. We however do not regard them as of controlling authority in giving construction to our statutes. The policy which dictated the adoption of their and our statutes may have been essentially different. Great wrong and injustice was perpetrated on our people by corporations, located in other jurisdictions, sending agents into this State, who in the name and on the behalf of such corporations transacted business with our people, acquired and held property belonging to the corporate body, and when the body became liable it defied the creditor and denied his right to sue in this State. Not only so, but many of our domestic corporations had the directors, officers and places of business in New York or other eastern cities, and insisted that all creditors must sue the company there, and not in this State. It was to correct these evils and prevent such wrongs that the act of 1853 was adopted, and to effectuate and not to thwart that policy this court has held the act must have given to it a liberal construction. We do not know the policy that prompted the adoption of the laws of other States on this subject.

It is urged that the statute requires insurance companies of other jurisdictions to file a written consent the service on its agent shall be accepted as service on the company, before it will be permitted to transact business in the State, and we must therefore conclude that this is legislative construction that the fifth section of the Practice Act should apply alone to our own corporations. It is more reasonable to suppose that as the general assembly were engaged in regulating and prescribing the terms upon which foreign insurance companies should be permitted to transact business in this State, the consent was required to prevent such litigation as this. It was no doubt done to settle and put at rest this question of service. And when the general assembly, if it ever shall, comes to place all foreign corporations under regulations, it would be in the promotion of justice to our own citizens, eminently proper to impose a similar requirement upon each of such bodies. Thus whilst extending to them the rights, privileges and immunities enjoyed by our domestic corporations, they shall be subjected to the same burdens and liabilities. This is eminently just. When natural persons come into the State, whether from other States of the Union or as aliens, they are required to conform and submit to the laws that govern our own citizens, and why not foreign corporations, who only transact their business at sufferance, while natural persons are here as a matter of right? Corporate bodies should be content to have extended to them the same rights that are enjoyed by natural persons, and foreign corporations should be content to receive the same privileges and protection as are extended to our own corporate bodies. There certainly is no law making any distinction.

It is urged that the garnishee must reside in the territorial jurisdiction of the court to render the process effective to reach the fund, and attachment according to the custom of London is referred to in support of the proposition. We are not bound or required by our statute adopting the common law of England, to enforce local customs, as it does not impose local customs and statutes as a rule of action in this State. On the contrary they are excluded. The proceeding by foreign attachment was unknown to the common law. It, by local custom, existed in London, Exeter, and may have existed in some other places. 1 Rolle's Ab. 552; 1 Com. Dig. 580. It was a local custom, and wholly governed by the special custom. As our legislature in nowise refers to it in adopting our earliest attachment law, or subsequent amendments or revisions, we have

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no ground to suppose that body had those customs in mind, or could have intended them to have any bearing in giving these acts construction. The decisions of other courts however are referred to in support of the same doctrine. It may be their attachment laws are borrowed from and based on these customs, and if so, their construction is justified, if not required. At any rate, those courts manifestly give a strict construction to their attachment laws. On the contrary, our statute is most liberal, intending to remove all technical objections, by permitting almost every kind of amendment at almost any stage of the proceeding, and expressly providing the writ may issue and be served on Sunday, when facts specified in the act are shown to exist. In view of these liberal provisions, and the spirit of the whole act, we should defeat the undoubted intention of the general assembly by adopting a strict construction. Hence the cases referred to are not of controlling authority.

It is urged and the agreed facts show, that the debt was owing in Missouri, by a Missouri corporation, to an inhabitant of that State, payable by the treasurer of the company to the creditor in that State, and therefore the company should not be required to pay it elsewhere, or in any other manner. Such debts are not local, nor to recover them must the action be local. It is urged that the demand being thus payable in Missouri, and by the treasurer of the corporation, a demand was required before an action could be maintained at another place. The doctrine that a plaintiff suing on a promissory note, payable at a specified place, need not aver and prove a demand, has been the settled law in this State for more than forty years. It was so announced in *Butterfield v. Kinzie*, 1 Scam. 445 (30 Am. Dec. 657), and *Armstrong v. Caldwell*, id. 546. In the first of these cases the court said the doctrine was so well settled by numerous authorities that it was unnecessary to refer to the decisions, or to examine the reasons upon which they were based. The question was again before the court in the case of *Hunt v. Divine*, 37 Ill. 137. In that case the former decisions were referred to, and controlled the decision, and decisions of a number of courts were referred to in illustration of the rule. The same question was again before the court in the case of *Wood v. Savings, Loan and Trust Co.*, 41 Ill. 267, with the same result. At that time a large number of authorities were referred to as supporting the doctrine. We, notwithstanding all that has been urged against it, must consider the doctrine as settled, and must hold a demand was unnecessary to a recovery.

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Nor do we see that the fact it was agreed that it was to be paid by the treasurer of the company can be of the slightest importance. It is believed to be the custom, without perhaps a single exception, that the treasurer of all corporate bodies holds and pays out their money. That is the purpose of the creation of his office and his appointment. It is a mere matter of convenience, to avoid the calling together the directors to make every payment by the body. Such a fact can have no legal significance, or change the rule of law governing ordinary transactions, or the legal rights of any one. The corporation is an artificial person, and in the pursuit of its legitimate business, unless it has express exemptions, must conform to the same rules that govern natural persons in like transactions.

Appellant refers to the Revised Statutes of the United States, section 739, as having some bearing on this question, but what, is not apparent. That section seems, as quoted, to regulate the service of process in some of the District Courts of the United States; but how or for what possible reason it can have the slightest effect on the State courts is not perceived. Even if it were possible to concede that Congress has the slightest power to regulate the practice of the State courts, there is no pretense that this act, in terms or otherwise, assumes to attempt any such thing. As well refer to the practice act of any State in the Union as controlling the practice of our courts. If that section can have the slightest effect, it is not perceived.

[Minor point omitted.]

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

PARKER v. ENSLOW.

(102 Ill. 272.)

Consideration — injury by practical joke.

The defendant kept a box of smoking tobacco on his counter for the gratuitous use of the public. The plaintiff was in the habit of filling his pipe therefrom, as was known to the defendant. The defendant, by way of joke, put gunpowder with that tobacco, and the plaintiff, filling his pipe therefrom, was injured by the explosion. The plaintiff made a claim against the defendant for damages, and the defendant executed to him the note in suit therefor. *Held*, valid. (*See note*, p. 591.)

ASSUMPSIT on a promissory note. The opinion states the facts. The plaintiff had judgment below.

James R. Ward, for appellant.

W. M. Jackson and Orendorff & Creighton, for appellee.

SCHOLFIELD, J. This case comes before us for review by appeal from a judgment of the Appellate Court for the Third District, affirming a judgment of the Circuit Court of Greene county. The action was *assumpsit*, upon a promissory note for \$1,000, executed by appellant to appellee, and the defense interposed was, that the note was executed without any consideration.

The evidence on behalf of appellee tended to establish that appellee, for a number of years, had been engaged in the retail grocery trade, including therein the sale of tobacco, in a building owned by him at Kane, in Greene county; that he sold out and transferred his stock and business and rented his store-room to appellant, who thereupon succeeded him in such trade; that for about twelve years before and up to the time of such sale and transfer it had been the custom to keep a box of smoking tobacco on the counter for the use of the public, and this custom was known to appellant, and continued by him after such sale and transfer; that it was the habit of appellee to pass into appellant's store-room and fill his pipe from this box, when convenient, and that pursuant thereto, at the time of the occurrence here involved, he passed into the store-room and filled his pipe with tobacco from the box; but without his knowledge, powder had been mixed with the tobacco, and so, when he applied a match to light his pipe, an explosion was caused, which seriously and permanently injured appellee's eyes. When subsequently appellee reproached appellant for having put the powder by which the explosion was caused in the tobacco, appellant admitted that he had done so, but sought to mitigate his conduct by saying that he had only done it for a joke. Appellee threatened, and was intending, to sue appellant for damages in consequence of the injury thus caused to his eyes, and as a compromise and settlement of that cause of action this promissory note was executed.

It is not important that there may have been other evidence in some respects contradictory of this, for since we are not allowed to

investigate controverted questions of fact in this class of cases, we must assume that the evidence established all that there was evidence tending to establish.

The second instruction given at the instance of appellee is as follows: "The court also instructs the jury, for the plaintiff, that if they believe, from the evidence, that the plaintiff, in the month of November, 1878, in good faith supposed he had a cause of action against the defendant, on account of personal injuries which he believed resulted from the conduct of the defendant, and thereupon threatened to sue the defendant on account thereof, and thereupon the difference between them was compromised, and the defendant executed the note sued on, in consideration that the plaintiff would not sue him for such injuries, and the plaintiff accepted the note in settlement of such claim, such compromise and settlement is a good and lawful consideration for such note."

Three objections are urged against this instruction, and they will be noticed in the order of their presentation by counsel for appellant.

[These being merely as to the construction of the instruction, are omitted.]

If the facts were as we have before said, we must assume the Appellate Court found them to be, there can be no doubt appellant was liable to some amount to appellee. The putting of powder in smoking tobacco, whether a mere thoughtless act for purposes of amusement, or a malicious act with an intention of doing harm, was necessarily extremely dangerous in its tendency, and can not be excused. Even if appellee had been taking the tobacco as a trespasser, this was not justifiable as a measure of prevention. Whart. on Neg., § 346; Wood on Nuis., § 135. There was therefore such a claim on behalf of appellee as to lay a reasonable ground for the appellant making the promise. *Mulholland v. Bartlett*, 74 Ill. 62; *McKinley v. Watkins*, 13 Ill. 143. And the only question to be settled was, whether the appellee honestly supposed or believed (using those words as convertible) that he had a cause of action, and whether the promissory note was in good faith given and accepted as a compromise of that cause of action. *McKinley v. Watkins, supra*; *Sigsworth v. Coulter*, 18 Ill. 204; *Honeyman v. Jarvis*, 79 id. 322.

We do not think the instruction could have misled the jury, and the giving of it was not therefore error.

[Minor matter omitted.]

Judgment affirmed.

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NOTE BY THE REPORTER.—See *Daringerfeld v. Thompson*, 33 Gratt. 136; s. c. 36 Am. Rep. 388; *State v. Hardie*, 47 Iowa, 647; s. c., 29 Am. Rep. 498; *Robertson v. State*, 2 Lea, 239; s. c., 31 Am. Rep. 602.

In *Fenton's case*, 1 Lewin C. C. 179, where the prisoners, in sport, threw heavy stones into a mine, breaking a scaffold, which fell against and upset a corf, in which a miner was descending into the mine, whereby he was killed, they were held guilty of manslaughter. TINDAL, C. J., said: "In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offense is manslaughter; if it is altogether unconnected with it, it is accidental death." The prisoners were sentenced to three months' imprisonment. In *Ex v. Powell*, 7 C. & P. 641, a lad, as a frolic, without any intent to harm any one, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the carman who was in it, loading it, was pitched backward on the stones and killed. *Held*, manslaughter. The prisoner was fined one shilling and discharged. In *Ewington's case*, 2 Lewin C. C. 217, the prisoners covered and surrounded a drunken man with straw, and threw a shovel of hot cinders upon his belly, whereby he was burned to death. PATERSON, J., charged that "if they believed the prisoners really intended to do any serious injury to the deceased, though not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter." Verdict, manslaughter. In *State v. Roane*, 2 Dev. 58, the defendant carelessly discharged a gun, intending only to frighten a supposed trespasser, really the servant of the prisoner, but killing him. *Held*, manslaughter. This case, although cited by Wharton under "practical jokes," does not answer that description; as also the cases cited in 1 East's P. C. 236, where the prisoner ducked a thief, who had picked his pocket, and accidentally drowned him. In *Ex v. Martin*, 3 C. & P. 211, the prisoner ordered a quartern of gin to drink, and asked a child present if he would have a drop, at the same time putting the glass to the child's mouth, whereupon the child snatched the glass and drank the whole contents, which caused his death. VAUGHAN, B., said, as this was the act of the child, there must be an acquittal, "but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter." Giving one phisic in sport, if fatal, is manslaughter. 1 East's P. C. 264. So, if one in shooting at another's fowls, in mere wanton sport, kills a human being. *Id.* 265.

In *Ex v. Conrah*, 2 Crawl. & Dix, 86, the prisoner and the deceased had been piling turf together, and the former, in sport, threw a piece of turf at the latter, hitting and killing him. *Held*, no crime. In *Ex v. Waters*, 6 C. & P. 823, there was testimony that the prisoner, in the course of rough and drunken joking, pushed a boat with his foot, whereby the deceased fell overboard and was drowned. There was also testimony that the push was given by another person. PARK, J., said, "if the case had rested on the evidence of the first witness it would not have amounted to manslaughter," and there must be an acquittal. In *Ann v. State*, 11 Humph. 159, an indictment of a nurse for murder of an infant by administering laudanum, a charge that if the drug was administered to produce unnecessary sleep, and contrary to expectation it produced death, this would be murder, was held erroneous.

BENNESON V. AIKEN.

(108 ILL. 284.)

Deed — delivery — agency.

Husband and wife executed and acknowledged a deed of the wife's lands, and it was left by the wife in the husband's hands, with authority to determine when, if ever, it should be delivered. The wife afterward built a house on the lands, in which she and her husband lived, and she subsequently died, and still subsequently the husband delivered the deed. *Held*, ineffectual.*

THE opinion states the case.

William H. Benneson, for plaintiff in error.

Marsh & McFadon, for defendant in error.

CRAIG, C. J. While the record in this case is somewhat voluminous, yet the principal, and indeed the only, question of any importance is, whether a certain deed, made May 16, 1866, by Charles A. Savage, and Elvey W. Savage, his wife, purporting to convey the premises in question to Anna Wells, was delivered.

It appears that Charles A. Savage married Elvey Wells in 1843. Levi Wells, the father of Mrs. Savage, died in 1859, intestate, leaving Anna Wells, his widow, and three daughters, Caroline Benneson, Ann E. Keeler, and Elvey Savage, as his only heirs. At the time of his death Levi Wells owned in fee 160 acres of land adjoining the corporate limits of the city of Quincy. In December, 1859, the three daughters of the deceased, by quitclaim deed, partitioned the quarter-section of land among themselves. The premises described in the deed of May 16, 1866, is that portion of the quarter which fell to Elvey Savage in the division. Charles A. Savage failed in 1857, and has remained insolvent since that time. In 1861 he conveyed, by quitclaim deed, his wife not joining in the deed, the premises to Anna Wells. On the 16th day of May, 1866, Savage and his wife executed and acknowledged a deed purporting to

* See *Byers v. Spencer*, ante, 212; *Otto v. Spencer*, post. In *Parker v. Parker*, 56 Iowa, 111, it was held that a deed delivered to the grantee's husband with intent to vest title, was a valid delivery, although the grantee did not know of it, and it was never delivered to her, but came into her possession some months afterward.

convey the premises to Anna Wells. Elvey Savage never had any children, and on the 19th day of July, 1873, she died intestate. If the deed of May 16, 1866, was delivered, of course she at the time of her death had no interest in the premises. If it was not delivered, then she died seised of the premises, and her husband inherited one-half of the same, which was liable to be reached by the bill filed by complainant. It is not claimed that there was any actual delivery of the deed to Anna Wells before the death of Elvey Savage. Indeed the proof shows that she had no knowledge of the existence of the deed until after her daughter's death.

After the deed was signed and acknowledged by Savage and his wife, Savage took the instrument and placed it in a safe in his office in Quincy, where it remained until after the death of his wife. Mr. Savage, in his evidence, testified that the delivery of the instrument, and the time when the delivery should be made, were left entirely with him. On his re-direct examination he testified as follows:

Int. 1. "In your cross-examination something has been said of conversations in connection with that deed of 1866. If Mrs. Elvey Savage attached any conditions or gave you any directions as to when that deed should be delivered or become her deed, except so far as it was left optional with you to determine, please state what directions or conditions she did attach or make about the delivery of the deed."

A. "She never left any directions."

Int. 2. "Then I understand, at all times prior to her death, and after she signed that deed, you had, with her consent, the full power to determine when, if ever, that deed should be delivered?"

A. "I did."

These are the leading circumstances under which the deed was signed by Savage and his wife, and placed in the possession of Savage, and it is contended that as Savage had no interest in the land, it being the sole property of the wife, he is to be regarded in the transaction as a stranger, and where a grantor places a deed in the hands of a stranger, with directions to deliver the same at his pleasure to the grantee (the deed being beneficial to the grantee on its face), it is a good delivery. A delivery is essential to the validity of every deed, but a deed may be delivered, although not actually passed over from the hands of the grantor to the hands of the grantee. Such being the case, it is often a question of much difficulty to determine whether a deed has been delivered or not. In

Bryan v. Wash, 2 Gilm. 557, it was held that no particular form is necessary to constitute a delivery. It may be by acts without words, or by words without acts, or by both. Any thing which clearly manifests the intention of the grantor and the person to whom it is delivered, that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery.

There is no evidence in this record that it was intended by the grantors in the deed that it should become operative, and vest the title in the premises in the grantee named in the deed. Mrs. Savage, the owner of the fee, according to the evidence, left it to the discretion of her husband to determine when, if ever, the deed should be delivered, and as he failed to exercise that discretion until 1873, after the death of his wife, his act was then a nullity. The conduct and acts of Mrs. Savage and her husband after the deed was made, which are proper to be considered, seem to establish beyond a doubt that there was no intention on their part to part with the title to the premises. In 1866 and 1867 a large house was erected on the premises by Mrs. Savage. She and her husband moved into this house and occupied it, exercising all the acts of ownership over the property after the deed was made as before, and this continued until the death of Mrs. Savage. These acts are inconsistent with the theory that Mrs. Savage intended that the deed of May, 1866, should be regarded as a conveyance of the property from the time she signed and acknowledged the instrument and placed it in her husband's hands. It is perhaps true that the presumption is, in the absence of proof, that a deed is delivered at its date; but that presumption can have no bearing here, as the evidence shows that the deed was not delivered until after the death of Mrs. Savage, when a delivery could bind no one. Had this deed been delivered to Mr. Savage to hold for the benefit of the grantee, and to be passed over to her at some definite time, the title to the land would no doubt have passed; but such was not the case. The deed was placed in the hands of Savage, with power in him to determine when, if ever, it should be delivered. This power he never exercised until it was revoked by the death of his wife, and no title passed by the instrument.

There is another view that may be taken of the transaction. Mrs. Savage could not convey the land unless her husband joined

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in the execution and delivery of a deed of conveyance. He and his wife were joint grantors. The possession of the deed after it was made out was a joint possession. Under such circumstances no title could pass, for the reason that the grantors retained the custody and possession of the instrument. If a man signs and acknowledges a deed, but makes no delivery, merely retains it in his possession until his death, when it is found among his papers, no one would pretend that such an instrument would pass title, and yet there is no substantial difference between such a transaction and the one under consideration.

It is also claimed that the title which Savage inherited upon the death of his wife inured to Anna Wells, under a deed he had made to her in 1861. The deed he made in 1861 was a mere quitclaim deed, containing no covenants whatever, and under the ruling of this court in *Holbrook v. Debo*, 99 Ill. 372, a subsequently acquired title would not pass to the grantee.

Some minor objections have been made to the rulings of the court, but we see no merit in them.

The decree of the Circuit Court is correct, and it will be affirmed.

Decree affirmed.

DRENNAN V. DOUGLAS.

(103 Ill. 341.)

Contract — to make a will — consideration — immorality.

A man had sexual connection with another's wife under promise of marriage. She became pregnant, and threatened him with prosecution. He then promised to make a will giving all his property to her and the child. *Held*, not enforceable.

BILL for specific performance. The opinion states the case. The defendant had judgment below.

N. M. Broadwell, for appellants.

Stewart, Edwards & Brown, and *Gross & Conkling*, for appellees.

CRAIG, C. J. This was a bill in equity, brought by Cassandra Drennan and Adaline Reed in the Circuit Court of Sangamon

county, against the administrator and heirs at law of the estate of John A. Reed, deceased, and to enforce the specific performance of an alleged contract to make a will. It is alleged in the bill that in the year 1865, Reed, under promise of marriage, seduced Cassandra Drennan, whereby she became pregnant, and in March, 1866, she was delivered of a child, Adaline Reed; that Reed was an unmarried man; that about four months after the birth of the child Reed visited complainants and admitted that he was the father of Adaline; that Cassandra Drennan made known to Reed her purpose to prosecute him, and take all such legal remedies as were authorized by the laws of the State for the wrong committed; that Reed, to induce her to desist and forbear legal proceedings, proposed to make a will by which he would give complainants all his property, and it was then and there agreed between Cassandra and Reed that she would forbear legal remedies, and in consideration thereof Reed agreed to make a will, and thereby give complainants all property of which he might be the owner at his death; that relying upon said agreement no proceedings were instituted against Reed. It is alleged that Reed died without performing said agreement, on the 4th day of September, 1876, leaving an estate consisting of personal property of the value of \$5,000, which is in the hands of James Douglas, administrator of the estate of Reed, duly appointed by the County Court of Sangamon county.

Under the facts of this case we do not deem it necessary to enter upon a consideration of the authorities, and determine the question whether a court of equity would or would not, under all circumstances, refuse relief where a bill is filed to enforce the specific performance of a contract to make a will. This case must be determined by the facts as established by the evidence, and the first inquiry is whether the alleged contract was made upon such a consideration as will give complainant a standing in a court of equity.

It is said that Reed was liable to be prosecuted for a breach of marriage contract, seduction and bastardy, by Cassandra Drennan, and the agreement on her part to forbear prosecution formed a sufficient consideration for the agreement to make the will. An examination of the evidence will show that complainant could maintain no action against Reed for seduction, for the obvious reason that when she was seduced and the child begotten, if seduced at all, she was a married woman, the wife of one Lawley, and if a

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right of action existed in behalf of any person, it was the husband. As to the marriage contract, as she was then a married woman, she could not enter into a marriage contract, and any marriage contract by her then made would be void. So far as the bastardy was concerned, it is very doubtful whether, under the facts as they existed, an action could be maintained. Cassandra was not divorced from her husband until July 11, 1865, while the child was born March 7, 1866, — less than eight months from the time when the divorce was granted. From these facts it is apparent that at the time complainant became pregnant, — allowing the usual period for gestation, — she was a married woman, and the presumption is that her husband was the father of the child. It is true that she commenced an action for divorce in January, 1865, but it is not proven that her husband did not cohabit with her in June, when she became pregnant.

The substance of the transaction when properly analyzed is this : Reed had connection with a married woman under promise of marriage. She became pregnant, whether by him or her husband is uncertain. She subsequently threatened prosecution, and he promised to make a will under which his property at his death should go to her and her child. Can a court of equity sanction and enforce a contract founded on such a consideration ? We think not. At the time the alleged agreement was made Reed was under no legal obligation whatever to complainant. It may be true that he had committed adultery with her, but if he had, that fact can not be regarded as a sufficient consideration to support a promise to make a will. It is a familiar rule of equity that a party seeking the aid of a court of conscience must come into court with clean hands. Here complainant violated her marriage obligation. When she became pregnant by Reed she violated the laws of the State, and was guilty of adultery, and then in turn undertakes to make these violations of duty and law the foundation for a consideration to support a promise, which she calls upon a court of equity to enforce. A court would stultify itself should it grant relief under such circumstances. A will, to be valid and effectual to pass property under our statute, is required to be reduced to writing, signed by the testator, and attested in the presence of two credible witnesses. If the relief prayed for in this case should be granted, and the alleged agreement to make a will enforced, the salutary provision of the statute would in effect be set aside, and estates of de-

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ceased persons would in many cases be at the mercy of some reckless pretender, who would ever be ready to work up some plausible state of facts to prevent property from descending in the mode pointed out by the statute.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CITY OF CHICAGO v. UNION BUILDING ASSOCIATION.

(108 Ill. 379.)

Highway — right of lot owner to restrain closing of street — constitutional construction.

An owner of land on a city street sought to restrain the city from vacating part of the street several blocks distant from his property. It did not appear that he would suffer special and peculiar injury, or that his property would be physically injured; but it did appear that he had paid an assessment for benefit by the opening of the street, and that by the closing he would lose some tenants. *Held*, not maintainable, although the Constitution provides that property shall not be damaged for public use without due compensation.

BILL to restrain the closing of part of street. The facts appear in the opinion and head-note. The plaintiff had judgment below.

Francis Adams, C. Beckwith, A. McCoy, W. C. Goudy, for appellants.

F. H. Kales and M. W. Fuller, for appellee.

SCHOLFIELD, J. We are of opinion that appellee has shown no such special or peculiar injury to its property as entitles it to an injunction, even if it be conceded that the proposed vacation and closing up a part of La Salle street is illegal. Appellee's building and lot are some three and a half blocks distant from the part of La Salle street proposed to be vacated and closed up. It is not, nor could it reasonably be claimed that the closing up of this portion of the street in any degree interferes with access to appellee's lot or with its use and enjoyment. The streets adjacent to

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it all remain in the same condition as to width, character of improvements, etc., that they were in before, and it is not pointed out how appellee will be otherwise specially or peculiarly injured by the proposed closing up of the portion of the street in question. The removal of the place of business of the board of trade will doubtless diminish the number of those desiring to become tenants of appellee; but it is not insisted that appellee has any legal right to control the movements or location of that corporation. Its dissolution or removal for a like or greater distance to any other locality, would in all probability have the same effect in diminishing the number of those desiring to become appellee's tenants.

It has never been claimed that adjacent property holders have a right to insist that corporations or individuals shall continue to do a particular business at a given locality, in order that such adjacent property holders may continue to enjoy the incidental benefits resulting from such business, and to so hold would be an end to all improvement.

All persons having to pass from appellee's property to Van Buren street, or to the depot of the Chicago, Rock Island and Pacific, and Lake Shore and Michigan Southern railroads, will, if the proposed vacation be affected, have to go a little farther than they otherwise would, and this will be, so far as concerns appellee, the only proximate effect of an illegal permanent obstruction placed in the part of La Salle street proposed to be vacated. Precisely the same injury will result to every one wherever located having to pass that route. They may to accomplish their journey have to make an additional turn and travel a little farther. Is this such an injury as authorizes a private party (one who has no authority by statute or otherwise to represent the public) to have the aid of a court of equity?

In *McDonald v. English*, 85 Ill. 236, we said: "We regard the rule as well settled, that for any obstruction to streets not resulting in injury to the individual, the public only can complain. Where however the obstruction is such that a public prosecution is authorized, and at the same time an individual has been specially injured thereby, as well as where the act has been private and an offense against the individual solely, he may maintain an action and recover for his special injury; but in such case the special injury is the *gist* of the action, and unless it is alleged and proved there can be no recovery."

In the American Law Register for October, 1880, one of the learned editors of that periodical, Mr. Edmund H. Bennett, in a note to *Fritz v. Hobson*, after a very elaborate review of the principal cases bearing upon the question now before us, comes, as we think, very correctly to the conclusion: "First, for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person; second, an action will lie for peculiar damages of a different kind, though even in the smallest degree; third, the damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort; fourth, the fact that many others sustain an injury of exactly like kind is not a bar to individual actions of many cases of a public nuisance."

The present case, it will be apparent from what we have already said, falls within the first of these conclusions. The damages sustained are of the same kind as those sustained by the general public, differing, if at all, only in degree, and this will be found to be amply sustained by the following cases cited by counsel for appellants. *Smith v. Boston*, 7 Cush. 254; *Castle v. Berkshire*, 11 Gray, 26; *Brightman v. Fairhaven*, 7 id. 271; *Paul v. Carver*, 24 Penn. St. 207; *Brady v. Shinkle*, 40 Iowa, 576; *Barr v. Oskaloosa*, 45 id. 275; *Ellsworth v. Chickasaw Co.*, 40 id. 571; *Shaubut v. Railroad Co.*, 21 Minn. 502; *Wilder v. De Cou*, 26 id. 11; *Pollak v. Orphan Asylum*, 48 Cal. 490; *Fearing v. Irwin*, 55 N. Y. 486; *Jackson v. Jackson*, 16 Ohio St. 163; *People v. Supervisors*, 20 Mich. 95; *Riggs v. Detroit*, 27 id. 262; *Hinchman v. Detroit*, 9 id. 103; *Transylvania University v. Lexington*, 3 B. Monr. 27; *Higbee v. Railroad Co.*, 19 N. J. Eq. 276; *Coster v. Mayor*, 43 N. Y. 399; *Bailey v. Railroad Co.*, 4 Harr. 389; *Delaware and Maryland R. R. Co. v. Stump*, 8 Gill & Johns. 479 (29 Am. Dec. 561); *Kittle v. Fremont*, 1 Neb. 329; *Sargent v. Railroad Co.*, 1 Handy, 52; *Haynes v. Thomas*, 7 Ind. 38; *Venard v. Cross*, 8 Kans. 248; *Railroad Co. v. Combs*, 10 Bush, 382; *Cent. B. and U. P. R. R. Co. v. Twine*, 23 Kans. 585; *Schulte v. U. P. T. Co.*, 50 Cal. 592; *Lansing v. Smith*, 8 Cow. 146.

It has been supposed in argument that our Constitution, in providing that "property shall not be damaged for public use without due compensation," necessarily modifies the doctrine of these cases

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to some extent. So far as affects the present question, we are of opinion this supposition is not well founded. In the recent case of *Rigney v. City of Chicago*, 102 Ill. 64, we had occasion to consider the effect of this provision of the Constitution, in a case in which access to property on one side and from one street was cut off, and we there, among other things, said: "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value; and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases, where but for some legislative enactment, an action would lie by the common law.

"The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present Constitution, after a most thorough consideration of the question lay down substantially the same rule here announced. *Chamberlain v. West End R. R. Co.*, 2 B. & S. 605, 110 E. C. L. R. 604; *id.* 617; *Beckett v. Midland Ry. Co.*, L. R., 1 C. P. 241; on Appeal, 3 C. P. 82; *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P. 508."

In the *McCarthy* case thus approvingly referred to, Lord CHELMSFORD, in stating the rule governing, said: "The learned counsel for the respondent proposed the following rule as a guide to the decision of each case: Where by the construction of works authorized by the legislature, there is a physical interference with a

right, whether public or private, which an owner of a house is entitled by law to make use of in connection with the house, and which gives it a marketable value apart from any particular use to which the owner may put it, if the house, by reason of the works, is diminished in value, there arises a claim to compensation. I think the rule as thus stated may be accepted, with this necessary qualification, that where the right, which the owner of the house is entitled to exercise, is one which he possesses in common with the public, there must be something peculiar to the right in its connection with the house to distinguish it from that which is enjoyed by the rest of the world." See 10 Eng. Rep. (Moak's notes) 1. See also to like effect, *Lyon v. Fishmongers' Co.*, 1 App. Cas. 663; 17 Eng. Rep. (Moak's notes) 51.

Counsel for appellee however contend that the principle is well established that powers conferred upon public officers in relation to corporate property are trusts, and that they hold the public property in trust, and that a Court of Chancery therefore has jurisdiction to prevent the common council from vacating the street as an inducement to the board of trade to remove its place of business on the application of any tax-payer of the city, and *Colton v. Hanchett*, 13 Ill. 615; *Prettyman v. Supervisors, etc.*, 19 id. 406; *Perry v. Kinnear*, 42 id. 160; *Chestnutwood v. Hood*, 68 id. 132; *Campbell v. Paris and Decatur R. R. Co.*, 71 id. 612; *Shaw v. Hill*, 67 id. 455; *Leitch v. Wentworth*, 71 id. 146; *Jackson v. Norris*, 72 id. 366; *Devine v. County Comrs.*, 84 id. 590, and *Mayor of Springfield v. Edwards*, 84 id. 626, are cited in support of the proposition. In all of these cases, except *Shaw v. Hill*, and *Jackson v. Norris*, relief was granted upon the ground that an unjust and illegal burden was being imposed upon the tax-payer to the extent of his *pro rata* part of the tax necessary to satisfy the demand, the collection of which was sought to be restrained, and so the complainant had a direct personal interest to be protected.

In *Shaw v. Hill*, the bill was to enjoin the removal of records, pending the contest of an election for the removal of a county seat. It was held the right to the writ was an incident to the right to file a bill to contest such election, as authorized by section 12 of the "act to provide for the removal of county seats," approved March 15, 1872. In *Jackson v. Norris*, it is only necessary to say the bill was by the State's attorney as the representative of the public.

Counsel further contend that it is equally well settled that city

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authorities hold the streets in trust for the benefit of all the corporators, and among other cases refer to *Carter v. Chicago*, 57 Ill. 283; *City of Chicago v. Wright*, 69 id. 318; *Dunham v. Village of Hyde Park*, 75 id. 371; *Brush v. Carbondale*, 78 id. 74.

The general expression in these cases that the city holds the streets in trust for the benefit of all the corporators, although accurate enough in its application to the facts there involved, is not, as we have shown in *Chicago v. Rumsey*, 87 Ill. 355, and *People v. Walsh*, 96 id. 232, strictly accurate. In the last-named case we said: "The city, as the agent or representative of the public, holds the fee for the use of the public—not the citizens of the city alone, but the entire public—of which the legislature is the representative."

As held in *Rigney v. Chicago, supra*, property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets which cannot be taken away or materially impaired by the city without incurring legal liability to the extent of the damages thereby occasioned, and to this extent perhaps it may be said there is a special trust (not shown in the present case to have been affected) in favor of adjoining property holders. But in no other respect do the property owners or citizens of the municipality have a right in the street other or different than that of the public generally.

The point is made however that appellee's property and other property in the vicinity on La Salle street was specially assessed as benefited by the opening of that part of La Salle street which it is now proposed to vacate and close, and the owners were compelled to and did pay considerable sums of money in consequence thereof, wherefore such owners have a special property in that part of the street. The point is not tenable. No case is referred to where it has been held that the payment of a special assessment gave the party paying a special property right in the street. If such a right were once recognized it is impossible to perceive why the principle would not recognize in every tax-payer a special property in the streets to the extent of the amount paid for opening or improving them, and thus in effect hold that the streets are the private property of those from whom the money was obtained which was paid out for their opening and improvement. Money raised by special assessment as well as by taxation becomes the property of the municipality in trust for the use for which it is raised, and all pri-

vate ownership in it ceases the moment it goes into the hands of the proper officer. There is certainly a strong natural equity in favor of a party who has been assessed for special benefits, that he should have the use of the streets for which he is thus made to pay, but it has never been deemed advisable to invest him, as a means of protection, with an equitable ownership in so much of the street.

There is nevertheless still another view to be considered. Every property holder in the city owes the duty of paying taxes and special assessments lawfully imposed for the opening, repairing and improving of streets, and we shall not at present, and for the purpose of the argument, question but that such property holders have an equitable right to have enjoined a breach of trust intended by the municipality, by which their burdens of taxes or special assessments for the opening, repairing or improving of streets, etc., will be materially increased.

The general doctrine according to Bispham's Principles of Equity (2d ed.), p. 512, is: "A corporation * * * cannot be compelled to perform a public duty at the suit of a private individual without some special right or authority."

In no case has it ever been held that a private individual may maintain a bill to enjoin a breach of public trust (in the absence of statutory authority) without showing that he will be specially injured thereby. See Angell on Highways, § 284; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *O'Brien v. N. and W. R. R. Co.*, 17 id. 372; *Delaware and Maryland R. R. Co.*, *supra*; *Paul v. Carver*, *supra*; *Sargent v. Railroad Co.*, *supra*. Indeed in a number of the States the courts have expressly denied the right of a private tax-payer to have restrained a threatened illegal municipal act that will result in increased taxation, holding that the only remedy therefor must be sought through those representing the public. *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 id. 318; *Hale v. Cushman*, 6 Metc. 425; *Craft v. Jackson County*, 5 Kans. 518; *Conklin v. Comrs.*, 13 Minn. 454; *Bagg v. Detroit*, 5 Mich. 336; *Chaffee v. Granger*, 6 id. 51.

It is said by Dillon in his work on Municipal Corporations (1st ed.), § 736: "The author may observe that there appears to be no difference of judicial opinion as to the right of the taxable inhabitants, whenever the threatened illegal corporate act will increase

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the burdens of taxation, to invoke the aid of equity to prevent it. The difference is as to the proper party plaintiff in a bill of this character. If the ordinary principle is applied it must be admitted that where the duty about to be violated by the corporation or its officers is public in its nature, and affects all of the inhabitants alike, one not suffering any special injury cannot in his own name or by uniting with others maintain a bill to enjoin it. * * * But it is agreed that any taxable inhabitant, or perhaps any citizen of the municipality, has such an interest to prevent or avoid illegal corporate acts that he may be a relator on whose application the proper public officer of the Commonwealth may, on behalf of the public, file the requisite bill to enjoin the menaced illegal act, or if it has been consummated to have relief against it." * * *

The proofs here show that all parties having property adjoining the part of the street proposed to be vacated, as well as adjoining the parts of the streets proposed to be widened, have given their consent to the proposed vacation and widening, and it is not shown that any one will be damaged within the principles laid down in the cases to which we have heretofore referred, in consequence of such vacation and widening, in such way as to fix a legal liability upon the city; nor is it shown how otherwise the burdens upon the tax payer will be materially increased. Neither therefore upon the ground that its property is legally affected by the proposed acts, nor that its burdens as a tax-payer will thereby be materially augmented, has the complainant shown a case entitling it to relief.

We think the judgments of the Appellate and Circuit Courts should be reversed and the bill be dismissed, and the judgment of the Appellate Court will accordingly be reversed and the cause remanded.

Judgment reversed.

SHELDON, J., took no part.

CITY OF EAST ST. LOUIS V. TRUSTEES OF SCHOOLS.

(102 IL. 499.)

Constitutional law — license fees — taxation.

A city may lawfully impose a license fee for dram-shops, and the legislature may lawfully direct that the proceeds shall be apportioned among the public schools of the city.*

ACTION to recover a license fee paid. The opinion states the case. The defendant had judgment below.

M. Millard, for plaintiff in error.

C. F. Noetting, R. A. Halbert and L. H. Hite, for defendants in error.

DICKEY, J. The city of East St. Louis embraces within its limits a part of town 2 north, in range 10 west, in St. Clair county, but does not embrace all of the territory in that township; and the city also embraces a part of town 2 north, in range 9 west, but does not embrace all of that township. The schools in both of these townships are all located within the city limits. The charter of the city, passed in 1869, gives it power, among other things, "to license, tax, regulate, prohibit and suppress dram-shops." By another section it is provided that "one-half of all the money received into the city treasury from dram-shop licenses collected shall be paid over at least quarterly to the treasurer of the school township No. 2 north, range 10 west, in St. Clair county, Illinois, by him to be apportioned to the several schools taught in said city, under the general school laws of this State, in the same mode and manner as interest on township school fund is now required to be apportioned and credited to the respective school districts," and "liable to the order of the respective boards of school directors as other funds for the support of said schools of said city, respectively."

This is an action brought in the city court of East St. Louis, by the treasurer of township No. 2 north, range 10 west, to recover

*To same effect, *People v. Mulholland* (32 N. Y. 334), 37 Am. Rep. 533.

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one-half of certain moneys, which it is conceded "were received into the city treasury from dram-shop licenses collected." Judgment was there rendered for the amount so received. To reverse this judgment the city brings the record here for review upon a writ of error.

Counsel for the city to reverse this judgment insists:

First — All taxes or revenues must be expended for the equal benefit of all who contribute in paying them, otherwise there would be inequality in taxation.

Second — A tax or revenue collected under one corporate authority cannot be applied in paying the debts and expenses of another, because all revenues must be raised for a corporate purpose, and that is not a corporate purpose.

Third — The legislature has no power to impose a corporate tax, or what is the same thing, divert a corporate tax, even for a corporate purpose.

Without questioning or in any way passing upon the accuracy of the propositions thus presented, it is sufficient to say that they have no application to the case presented by this record. This is not a tax in the sense in which that term is used in our Constitution and statutes. In *Craw v. Tolono*, 96 Ill. 261, it was said: "Taxation is imposed upon the citizen, or resident of the State, or municipal corporation, or person doing business within the jurisdiction thereof, to compel him to contribute to the maintenance of the government by which his life, liberty, property or business is protected, in common with that of other citizens, residents, or persons doing business. Taxation is subject to certain regulations of our Constitution as to equality and uniformity. Where a municipal corporation has power to prohibit the doing of a thing, and also the power to license the same thing to be done the license fee demanded by ordinance for the doing of such thing is not a tax, but is a price paid for the privilege of doing such thing." So it was held in *People v. Thurber*, 13 Ill. 554; *Insurance Co. v. Peoria*, 29 id. 180; *East St. Louis v. Wehrung*, 46 id. 392; *Ducat v. Chicago*, 48 id. 172; *Walker v. Springfield*, 94 id. 372. In *People v. Thurber*, it is said of a like exaction: "This is not a tax, * * * but is a burden * * * for the right of exercising a * * * privilege which the legislature would have the right to withhold or inhibit altogether." This language is quoted with approbation in *Walker v. Springfield*, *supra*, decided in 1880. In *Chilvers v.*

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People, 11 Mich. 43, it is said of a license fee: "It is not a tax," in the sense in which that word is used in the Constitution of that State, and it is added: "It is a price paid for a franchise * * * vested in an individual."

The State has expressly clothed the city of East St. Louis with power "to license, * * * prohibit or suppress dram-shops," and by implication from other words of the charter has authorized the city to receive money into the city treasury derived "from dram-shop licenses." Such a fund is not required by any known constitutional requirement, to be applied solely to municipal purposes. The general assembly had the power to dispose of such a fund for any public use. It might be required to be paid into the State treasury, the county treasury, or applied to the use of schools in any district or place where the general assembly might think proper to place it.

We find no sufficient ground on which to assail the validity of the statute. The judgment is therefore affirmed.

Judgment affirmed.

HANNA V. READ.

(101 Ill. 596.)

Judgment — former foreign.

A judgment of a court of competent jurisdiction in Indiana, upon a trial on the merits, setting aside a deed to the grantor's wife for the insanity of the grantor, is conclusive in a suit in Illinois, as to another deed made at the same time by the same grantor to a trustee for his wife.

BILL to set aside deed. The opinion states the facts. The defendant had judgment below.

Walker & Carter, for plaintiffs in error.

Wilson, Martin & Cook, for defendant in error.

MULKEY, J. Ezra B. Read, on the 26th day of April, 1877, was the owner in fee of a large amount of real estate, situate in Vigo

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county, Indiana, where he then resided with his family. He was also at the same time the owner of other valuable real property in Chicago, this State, being the same now in controversy. On the day above mentioned, at his residence in Vigo county, he executed two deeds, embracing the whole of his estate, by one of which he conveyed directly to his wife, Susannah M. Read, the Indiana lands, and by the other, under the advice of counsel, he conveyed the Chicago property to Marvin M. Hickox, who thereupon, in pursuance of a previous understanding between the parties to that effect, conveyed the same property to Read's wife, so that by means of the three deeds she became clothed with the apparent legal title to all her husband's lands.

On the 10th of the following month Read died intestate, leaving the said Susannah M. Read, his widow, and Sarah O. Hanna, Jonathan T., Kenton C., Broady, and Parke Read, his children, only heirs at law. The first three of the children above mentioned were by his first wife, and the other two, Broady and Parke, by his second wife. Shortly after the death of Read his children by his first wife, the present plaintiffs in error, commenced a suit in the Circuit Court of Vigo county, against the widow and her two children, Broady and Parke, for the purpose of having Read's deed to his wife of the Indiana lands set aside and cancelled, on the alleged ground that at the time of making the conveyances above mentioned he was insane, and on the further ground that said conveyances were obtained through the fraud and undue influence of the grantee.

The defendants having been duly served with process, appeared in court, and by their answer distinctly denied the charges of insanity and undue influence, and upon the issues thus formed the cause was heard and determined upon the merits at the November term, 1877, of the Vigo County Circuit Court, resulting in a judgment and decree, setting aside the deed to the Indiana lands. As a basis of that decree the court specifically found that Ezra B. Read executed the deed because of the undue influence and fraudulent conduct of the said Susannah M. Read, and that at the time he so executed these deeds, on the 26th of April, 1877, "he was of unsound mind, and incapable of making said instruments." The decree and specific findings of the Circuit Court of Vigo county are still in full force and effect.

Plaintiffs in error, assuming the adjudication in the Indiana

court was conclusive upon the question of Read's mental condition at the time of making the deeds in question, filed the present bill against the defendants in error, alleging, as was done in the former case, the insanity of Read, and the undue influence and fraud of his wife, and also setting up the proceedings in the Vigo county Circuit Court, including the decree and findings in said cause as heretofore stated, and relied upon the transcript of the record of that case as evidence to sustain the bill in the present case. The Circuit Court however refused to admit the transcript in evidence, and plaintiffs in error not offering any other or further evidence with respect to the insanity of Read, or the undue influence and fraud of his wife, the court entered a decree dismissing the bill, to reverse which the complainants in the bill bring the case to this court by writ of error.

The immediate question presented by the record of our determination is, whether the court below erred in excluding from its consideration as evidence the transcript of the proceedings in the Vigo county Circuit Court, and the solution of this question of course depends upon what, if any, effect must be given to the record of those proceedings as an instrument of evidence in the present suit for the purpose of establishing the alleged insanity of Read, or the fraud and undue influence of his wife. Since the proof of either of these facts would fully warrant the relief sought by the bill—and it is clear if the record be competent evidence to establish the one, it is the other—it will only be necessary to consider the question so far as it relates to the mental capacity of Read at the time of executing the deeds.

On the other hand, it is insisted by defendants in error that all the conditions essential to the admissibility of such evidence are wanting—that there is neither identity in the thing sued for in the cause of action, nor of the parties in the two actions, and hence they conclude the evidence was properly excluded. On the other hand, plaintiffs in error maintain that in the former suit the mental capacity of Read at the time of the execution of these deeds was directly put in issue by the pleadings, fully considered, and expressly determined by the court, as appears from the pleadings and decree in that cause; that within the meaning of the law relating to a former adjudication, when operating as an estoppel, the parties to the present and former actions are the same, and hence, although there is a want of identity in the thing sought to be re-

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covered, and the cause of action in the two suits, the record of the decree in the former suit, which specifically finds that Read at the time in question was insane, and incapable of making a conveyance was not only competent evidence to establish that fact in the present suit, but was absolutely conclusive of it, and in this position we are of opinion plaintiffs in error are sustained by the decided weight of authority.

The contention of defendants in error, that before an adjudication in a former suit can be made available as an estoppel, it must appear that the thing sought to be recovered, and the cause of action in both suits, are the same, is not universally true. A careful examination of the subject will show there is a diversity in the cases in this respect, which, if kept in view, will satisfactorily explain what would otherwise appear to be irreconcilable statements of different courts of the highest respectability in discussing the law of estoppel by judgment or verdict. Where the former adjudication is relied on as an answer and bar to the whole cause of action, or in other words, where it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear, as claimed by defendants in error, that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment, and the judgment itself is commonly characterized as a bar to the action; but where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense. The estoppel relied on in the present case clearly belongs to the class last considered, so it is unimportant whether the cause of action is the same in both cases or not. Although there is the diversity in the two classes of cases we have mentioned, it is apprehended there is no material difference in the principles by which they are governed.

Whether the adjudication relied on as an estoppel goes to a single

question, or all the questions involved in a cause, the fundamental principle upon which it is allowed in either case is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication. The foregoing view of the law on this subject is believed to be fully sustained by the following authorities: *Betts v. Starr*, 5 Conn. 550 (13 Am. Dec. 94); *Parher v. Standish*, 3 Pick. 288; *Van Rensselaer v. Akin*, 22 Wend. 549; *Aurora City v. West*, 7 Wall. 82; *Young v. Black*, 7 Cr. 565; *Miller v. Manice*, 6 Hill. 114; *White v. Coatsworth*, 2 Seld. 137; *Eastman v. Cooper*, 15 Pick. 276; *Gardner v. Buckbee*, 3 Cow. 120; *Bouchaud v. Dias*, 3 Den. 243; *Hayes v. Gudykunst*, 1 Jones, 221; *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, id. 423; *Duchess of Kingston's case*, 2 Smith's L. C. 424; *Outram v. Morewood*, 3 East, 346; *Monott v. Hampton*, 7 T. R. 269; *Aslin v. Parkin*, 2 Burr. 665.

It is not denied that the decree and findings in the Indiana case conclusively establish the insanity of Read at the time of making the conveyance to the Indiana lands, but it is suggested that notwithstanding the evidence conclusively shows that the making of the deed to the Illinois land was at the same time, and that the execution of these conveyances constituted one and the same transaction, still of necessity there must have been a moment of time intervening between the execution of the two deeds, and hence it is maintained we can only arrive at the conclusion the grantor was insane at the time of making the deed to the Illinois land by mere argument or inference, which is not permitted in applying the doctrine of *res judicata*. We regard this position as too technical and refined for any practical purpose. To adopt it would be to lose sight of the real substance of the transaction, and to go in pursuit of its shadow. It would place the court in direct antagonism with a number of the cases above cited, and afford a striking illustration of what is known as "sticking in the bark."

That the mental condition of Read at the time of making these deeds was put directly in issue by the pleadings, and expressly decided by the decree in the former suit, we think clear, beyond all doubt. Both deeds were made exhibits to the bill in that case,

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and in referring to these deeds it is expressly charged in the bill, "that at the time of executing said deeds said Ezra B. Read was of insane mind, and said supposed deeds were not his deeds." This allegation was put directly in issue by the answer of the defendants, which was a general denial of all the allegations in the bill. Upon the issue thus formed the cause was submitted to a jury, and was tried upon the merits. The jury returned a general verdict for the complainants, and thereupon the court, in pursuance of the verdict, entered a formal judgment, wherein it was adjudged and decreed, "that the matters and things alleged in the complaint, and each paragraph thereof are true as therein alleged." One of these allegations thus found by the decree to be true, as we have just seen, is that Read at the time of making these deeds was of "insane mind." It is thus clear, both from the pleadings and decree, that the insanity of Read was fixed and conclusively established at the time of making these deeds. Their execution being concurrent acts, and constituting but one transaction, his insanity could not, in the very nature of things, have been shown as to one deed without showing it as to the others also, and the mere fact that that court had no power to enter a decree directly affecting the title to the Chicago property does not at all affect the conclusiveness of its finding as respects Read's insanity at the time of making these deeds.

It is further objected that the parties to the former and present suits are not the same. This objection we do not regard as tenable. It is sufficient for the purposes of the rule relating to a former adjudication, when relied on as an estoppel, that the parties be substantially the same, and so we regard them in the present case. *Thompson v. Roberts*, 24 How. 233; 7 Rob. Prac. 137; *Drake v. Perry*, 58 Ill. 122. In the case last cited the holder of a note indorsed in blank brought an action upon it before a justice of the peace, in the name of the payee, for his use, in which a judgment was rendered for the defendant. The holder without taking an appeal subsequently withdrew the note from the justice, filled up the blank indorsement with his own name, and instituted another suit upon it in his name as indorsee, and it was held the judgment in the first action was a bar to the second. There, although the parties were nominally different, nevertheless the doctrine of *res judicata* was applied on the ground the parties in interest were the same.

It is not important to determine whether Hickox is a necessary or even a proper party to the present suit. The utmost that can be claimed is that he is a mere formal party, having no interests that can be affected by the result of the litigation, let it go as it may. In fact by his answer he disclaims all interest in the subject matter of the suit, and shows, as is conceded, that he was used in the transaction merely as one of the instrumentalities by which Read attempted to convey the Illinois lands to his wife. Had Read been of sound mind Hickox would have subserved the purpose of a mere conduit, through which the title to the lands would have passed from him to his wife, and nothing more. The bill in this case seeks no relief whatever of Hickox, and if he has any possible interest in this question of estoppel, it is clearly, in the light of his own answer, in favor of sustaining the former adjudication. But as before stated, we do not regard him as having any legal interest in the subject-matter of this suit, or the vital question upon which it depends.

The further point is made that even conceding the general current of authority upon the subject of estoppel, so far as it affects the present controversy, to be as we have stated, still it is claimed that under the decisions of Indiana the adjudication in question would not be conclusive of Read's insanity in a subsequent suit like the present in that State. If this claim is justified by the actual decisions of that State, it must be confessed that it affords a conclusive answer to the chief ground upon which the present decree is assailed. The case mainly relied on in support of this position is *Roberts v. Robeson*, 27 Ind. 454, and it must be conceded that if that was the only evidence of the rule in that State upon the subject, the case would seem to justify the conclusion which defendants in error draw from it; but we regard that case not only unsound on principle, but as inconsistent with both the previous and subsequent decisions of the same court. *Reeves v. Plough*, 46 Ind. 350; *Bates v. Spooner*, 45 id. 489; *Pressler v. Turner*, 57 id. 56; *Davenport v. Barnett*, 51 id. 329.

In the case last cited a junior mortgagee filed a complaint to foreclose, making a senior mortgagee a party, and alleging the latter had been paid the amount of his mortgage, but that notwithstanding such payment he was fraudulently confederating with others to enforce payment again out of the mortgaged estate, for the purpose of defeating the claim of the complainant. The senior

mortgagee made no defense to this action, and there was a decree or judgment *pro confesso* rendered against him. Subsequently the latter brought an action to foreclose his own mortgage, making the junior mortgagee a party, who set up, by way of defense, the adjudication in the former suit, and the decree in that case was held conclusive upon the question of payment of the senior mortgage. In that case it was urged, as it is in the one before us, that the doctrine of *res judicata* should not apply, for the reason the parties were not the same in the former as in the subsequent suit; but the objection did not prevail, and the court laid down the general rule, which is in perfect harmony with the current of authority on the subject, that "any of the parties to an action between whom issues have been formed and determined may, in a subsequent action, where the same issues are tendered, plead a former adjudication as between them, although the parties to the different actions may not all be the same persons." It will be also perceived that neither the causes of action nor the objects of the two suits were the same. In the former suit the debt secured by the junior mortgage was the cause of action, and the object was to foreclose that mortgage by making it a prior first lien. The object of the second suit was to enforce the older mortgage as a superior and subsisting lien on the mortgaged property, and the cause of action was the alleged existing debt secured by the older mortgage. Yet the question whether the first mortgage debt had been in fact paid was presented in both cases, and hence its determination in the former suit was conclusive of it in the latter. So in the case before us, while there is no unity in the causes of action, or of the objects of the two suits, and only a partial unity as to the parties, yet as in the cases just considered, the question whether Read, at the time of making the deeds in question, was insane or not, was involved in both suits, and its determination in the first must be accepted as conclusive of it in the second, and this conclusion is fully sustained by *Davenport v. Barnett, supra*.

It is sought also in the present case to avoid the effect of the Indiana decree, on the alleged ground that Mrs. Read herself was insane at the time these proceedings were had, and that by reason thereof a misunderstanding arose between her and her counsel, which resulted in preventing a fair trial on the merits. It is clear on authority such a defense cannot be made available in a collateral proceeding like this. If what is claimed be true doubtless an orig-

inal bill of complaint would lie in the court where that decree was rendered, for the purpose of impeaching it, on the grounds stated, or there may be other means of redress afforded by the law of that State; yet we are aware of no principle that will sanction the attacking of a judgment or decree of a sister State for such cause in a mere collateral proceeding, as is sought to be done here. It is true a few cases may be found where this has been permitted, yet we do not regard them as sound in principle, and they are in direct conflict with the general current of authority on the subject. It is conceded that the Circuit Court of Vigo county had jurisdiction both of the parties to the suit and the subject matter of litigation, and such being the case, the decree there must be held conclusive on the parties until reversed or otherwise set aside by some direct proceeding for that purpose. It is not claimed or pretended that the decree could be thus collaterally attacked in the State where it was rendered, and to permit it to be done here would be to wholly disregard that provision of the National Constitution, and the act of Congress carrying it into effect, which provide that the record of a judgment of a sister State, when properly authenticated, shall be entitled, when offered as evidence in another State, to the same faith and credit which it is entitled to in the State from which it is taken. This of course is not permissible. This conclusiveness, which is uniformly given to the judgments of a sister State, is now, by the weight of modern authority, extended to the judgments of foreign countries, and the rule has been fully recognized by this court.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

SCOTT, J., dissented.

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OTIS V. SPENCER.

(108 ILL. 622.)

Deed — delivery — marriage — ante-nuptial settlement.

An insolvent, in accordance with an oral agreement of marriage, executed and acknowledged a deed to his intended wife, and handed it to her before marriage, and she handed it back to him to have it recorded and to take care of it for her. He recorded and kept it. *Held* (1), a valid delivery* (2), a valid ante-nuptial settlement as against creditors, the grantee being ignorant of the grantor's insolvency. (*See note, p. 622.*)

BILL by a receiver to subject property to payment of debts. The opinion states the case. The bill was dismissed below.

J. L. High, for appellant.

Henry B. Mason, and *Owen F. Aldis*, for appellee.

WALKER, J. On the failure of the State Savings Institution of Chicago, appellant was appointed receiver of its assets, by a decree of court. He, as such receiver, filed a bill to subject the property, the title to which is in controversy, to the payment of the debts of the insolvent institution. The bill alleges that David D. Spencer, one of appellees who was at the time, and had been some years previously, the president of the institution, was indebted to it on a note for \$39,240.73; that appellant, as such receiver, had sued on it and recovered a judgment; that a part of the indebtedness was incurred as early as the last of December, 1875. The bill also alleges Spencer's insolvency; that the premises were his homestead, in which he and his family resided up to the time of the failure of the bank. Being wholly insolvent, and in contemplation of a marriage subsequently solemnized between him and Mrs. Spencer, then Susan A. Dennis, he, on the 23d day of November, 1876, made and acknowledged a deed conveying his homestead to her; that the deed was made to hinder, delay and defraud his creditors. Service was had by publication. There being no answers filed, the bill was taken as confessed, and the relief prayed was granted. Defendants subsequently, on leave, under the statute, filed an answer. A hearing was had, resulting in a decree in favor of complainant.

* See *Bennison v. Allen*, ante, 592.

The case was brought to this court, and the decree of the court below was reversed, and the cause remanded. It will be found reported in 96 Ill. 570. The bill was amended by alleging that the deed of conveyance for the property was never delivered, and therefore no title passed under it. Another hearing was had, and the bill was dismissed, and the case is again brought to this court.

[Omitting a matter of evidence.]

Having disposed of this preliminary question, we shall proceed to the consideration of the important questions of the case. The fact that the deed was made, acknowledged and recorded, is not contested, but it is denied it ever became effective, for the want of a sufficient delivery. From the long line and numerous decisions of this court the rule is well settled, without referring to the decisions of other courts, that to render a deed of conveyance operative to pass the title, there must be an unconditional delivery, or a delivery in *escrow*. This has been announced in almost every volume of our reports, and if it had not been, the rule is so elementary as to require the citation of no adjudged case for its support. We are not aware that the rule has ever been denied. But what acts constitute such a delivery has been the subject of much controversy, and we have held in many cases that the act must be such as to manifest an intention by the grantor to make a delivery, and to part with the possession and control of the instrument; and it has been said that intention may be gathered by acts, by words, or by both. It has been said it is not essential that the deed be delivered to the grantee, but may be to an agent or another for the grantee. This has been so repeatedly said that it should be familiar to the entire profession, hence we refrain from referring to the cases.

Was the deed delivered by the grantor to the grantee in this case, is the first and an important question. Mrs. Spencer swears that on the 11th, 12th or 13th of December, 1876, he handed her the deed, and after some conversation relating to it, she returned it to him for the purpose of having it recorded, and to take care of it for her; that she did not remember seeing it after he gave it to her on the date referred to, until the 26th of August, 1877, when she gave it to Judge Grant, her attorney, with some other papers and her will, to take care of in her absence; that she was extremely busy preparing for the wedding, and for that reason did not remember the details; that she was positive she saw the deed at that

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time. Her husband testifies that on the 12th or 13th of December, 1876, "I gave her the deed, saying to her, 'there is the deed of the house on Thirty-ninth street, which I have conveyed to you in accordance with my promise and the conditions we have talked of,' or words to that effect," and the testimony shows that he was to convey to her this property if she would marry him. This evidence most assuredly is clear and distinct, and if entitled to belief, proves that the deed was delivered.

[Omitting a discussion of the evidence.]

We fail to find anything in the attending circumstances that overcomes, or requires us to disregard, their evidence, and it proves that after the deed was prepared, signed by Spencer, witnessed by a clerk in the bank and acknowledged by him, and certified by a notary public, he handed the deed to the grantee, his intended wife, but a day or two before their marriage.

Then what was the purpose of Spencer in giving the deed to appellee? He specified no other purpose than a delivery of a deed by a grantor to his grantee. Is it not the natural, if not the inevitable conclusion, when a grantor, after making a sale of real estate to another, prepares a deed conveying the premises, and gives it to the grantee without stating it is for a different purpose, that it is done as a delivery of the deed? Is it possible, even when nothing is said accompanying the act, for any reasonable mind to resist the conclusion that such was the purpose? It would seem it could not. Had he intended it for a different purpose, can any one suppose he would not have stated it? She was unconditionally placed in possession and unrestricted control of the instrument, and that was a delivery sufficient to, and did, vest the title to the property in her, and whatever afterward became of the deed could not affect the title thus vested in her. After its delivery it was only evidence of the title thus conveyed.

Marriage, from the earliest period of the common law, has ever been held to be a sufficient consideration to support a conveyance of land, and such conveyances have ever been regarded as entitled to as full protection as conveyances made on the most ample pecuniary considerations,—that the grantee is entitled to hold the property precisely as if she had paid in money the full value of the property. This being true, and this conveyance, as all concede, having been made in consideration that the grantee would marry the grantor, that was a sufficient consideration to make it valid and

binding on all parties, including creditors, if it cannot be assailed on other grounds. These are plain and familiar propositions, that require the citation of no authorities for their support. Some propositions must be considered as axiomatic, and these are of that character.

It is however urged that Spencer was at the time hopelessly insolvent, and that he, in making this conveyance, intended to perpetrate a fraud on his creditors. If this were conceded to be true, will it be contended that a purchaser paying a full pecuniary consideration for the property, and not intending to aid or assist Spencer in committing the fraud, would not be protected, and would be compelled to surrender the property to the creditors, and lose the money he paid in good faith for it? Surely not. While the law is vigilant in protecting creditors against the fraud of their debtors, it never despoils or confiscates the property of innocent purchasers for their benefit. Such purchasers have the same right of protection in their rights as have creditors, and it must be remembered that Mrs. Spencer is entitled to the same protection as had she been a cash purchaser, and had paid every dollar the property was worth. If under the circumstances, such a purchaser would be protected, she must be.

It is however insisted, that as the husband of appellee was utterly insolvent, if she knew or was charged with notice, we must presume she was a party to the fraud, and as to creditors the deed is void. If this were true, which we do not concede, where is the evidence that she had notice of the fact? We fail to find it in this record. She denies all knowledge of it. She says that from what she heard in general conversations with her uncle, with whom she lived, and who was a trustee in the bank of which Spencer was the president, she supposed he was a man of wealth and of high pecuniary and social position, and of the hundreds of thousands of persons residing in the city, and of the twelve or thirteen thousand creditors of the bank, there is not one shown to have even suspected his solvency, much less to have known he was a bankrupt. Then why require of her a knowledge of that which no one else even suspected? It is true that eight or nine months after, she and all others knew that he was then a bankrupt, and they may have suspected he was when the deed was made.

But it is said that Judge GRANT, who was attorney for her husband as well as herself, when consulted as to whether he

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could make a conveyance of the homestead to her as his contemplated wife, informed Spencer such a conveyance, unless he was indebted beyond his means to pay, would be good, but it was doubtful whether it could be sustained as good against creditors. He thinks, but does not positively say, that he in substance afterward stated the same to her. She, on the contrary, testifies she had no recollection of such a conversation. But if it were conceded, would that be notice of any fact, if pursued, that would have led to notice, as appellant's counsel insists it was? The witness stated no fact. He did not say that Spencer was indebted a dollar, or that he believed or even suspected he was. He did not say it was so rumored, or had been suggested by any one. He named no fact calculated to arouse a suspicion that Spencer was indebted to any one, much less that he was insolvent. We are unable to see why this should have put her on inquiry. Even if notice would affect the validity of the deed, none is shown, actual or constructive.

That marriage is a sufficient consideration to support a deed or marriage settlement, has become a rule of property, and it has everywhere been regarded and acted upon as unquestioned law, and no one can say the extent of values that would be changed and titles destroyed were it now held that marriage is not a consideration to support a conveyance of real estate. If it is necessary to change the rule, let it be done by the legislature, and its action will be prospective, and not retroactive, to unsettle titles and deprive men of their estates honestly acquired. They should not be deprived of their property as a class, that the creditors in this case, however meritorious, may get the proceeds of this property.

It is urged that a person indebted can not make a valid marriage settlement; that although not so in form, this conveyance was in substance such a settlement; that Spencer being hopelessly insolvent, it was a fraud on his creditors to make this deed. The power for a debtor to do so is sanctioned by a long line of decisions coming down from an early period, with the single limitation that the grantee shall not receive the grant to aid or assist the grantor to defraud his creditors. The books abound in cases that support the doctrine, with scarcely an opposing decision. Such was the rule of the common law of England when it was adopted by our legislature, and no reason is perceived why it is not adapted to our condition, and it is not repugnant to our institutions. It is not repugnant to but coincides with a sound public policy, to permit a

woman, before assuming the marriage relation, to insist that a suitable provision shall be made for herself and the helpless offspring of the marriage. The public has a deep interest in the welfare of all of its members, and especially the tender and the helpless. Justice does not demand that all other public interests shall yield to that of the creditor class. It has a right to be fully protected in all of its rights, but has no right to demand that all other interests shall be disregarded for the advancement of their interests. Community must be regarded by government as a whole, and its varied, if not infinite, interests are all equally entitled to protection at its hands. But this question is in principle settled when it is held that marriage is a sufficient consideration to support a conveyance, and that it must be protected precisely as a conveyance based on a full valuable consideration. Post-nuptial settlements and conveyances depend on entirely different considerations. In such cases there is no consideration to support the conveyance. The marriage has already been consummated, and that can form no consideration to support such a settlement. In such cases the conveyance is voluntary, and a man must be honest before he is generous. Hence in such cases he must be free from debt, or if indebted at the time of the settlement, he must retain ample means to discharge his indebtedness, or the settlement will be held fraudulent as to existing creditors. Ante and post-nuptial settlements depend on entirely different principles. The one is made on a sufficient consideration and the other without any consideration.

On a full and careful consideration of all the objections urged against the decree we fail to perceive any error, and it is affirmed.

Decree affirmed.

NOTE BY THE REPORTER.—Several recent decisions on ante-nuptial settlements may advantageously be gathered here. In *Prewitt v. Wilson*, 103 U. S. 22, it was held that in order to render an ante-nuptial settlement void as a fraud upon the grantor's creditors it must first appear that both parties were cognizant of the intended fraud; a fraudulent intent on the part of the grantor, in making such a settlement, of which the grantee was innocent, will not have such an effect; and a mere knowledge by the grantee that the grantor was embarrassed will not amount to fraud. FIELD, J., said "When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor. Now marriage is not only a valuable consideration, but as Coke says, there is no other consideration so much respected in the law. Bishop justly observes, that 'marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by inquiet or repose to the state; by what money ordinarily buys and by what no money can buy, to an extent which can not be estimated or expressed, except by the

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word infinite. To say therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth.' And also, that 'marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value.' Law of Married Women, §§ 775-6. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an ante-nuptial settlement. *Barrow v. Barrow*, 2 Dickens, 504; *Nairn v. Prose*, 6 Ves. 752; *Campion v. Cotton*, 17 id. 264; *Slerry v. Arden*, 1 Johns. Ch. 261; *Herring v. Wickham*, 23 Gratt. 628; s. c., 26 Am. Rep. 405. In *Magniac v. Thompson*, this court said that 'nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage in contemplation of the law is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution.' 7 Pet. 393. The same doctrine is asserted by the Supreme Court of Alabama, in which State the parties to the deed of settlement reside, and in which it was executed. *Andrews v. Jones*, 10 Ala. 401. According to these authorities there can be no question of the validity of the settlement in this case. There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud; for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement."

This case is reported below, 3 Woods, 631.

In *National Exchange Bank v. Watson*, 18 R. I. 78, the court upheld an ante-nuptial settlement as against creditors, the grantee being innocent, although an untrue consideration was stated, the deed was not recorded, and the grantor made repairs and improvements on the estate conveyed. They said: "Marriage is deemed in law a valuable consideration. A conveyance therefore in consideration of marriage stands upon a different footing from a voluntary conveyance. All the authorities agree to this extent, at least, that a man though indebted, may settle a portion of his property on his intended wife, and that in the absence of fraud, the settlement, if no more than a reasonable provision for the wife, will be upheld against existing as well as subsequent creditors. *Campion v. Cotton*, 17 Ves. Jun. 264, 271, 272; *Armfield v. Armfield*, Freeman (Miss.), 311, 316; *Croft v. Arthur*, 3 Des. 223, 232; *Buckner v. Smith*, 4 id. 371, 372; *Davidson v. Graves*, Riley's Eq. 232, 235-238; *Magniac v. Thompson*, 7 Pet. 348, 397; *Marshall v. Morris*, 15 Ga. 368, 373, 374; *Smith v. Allen*, 5 Allen, 451, 451; *Buise v. Miller*, 5 Or. 110, 112." "In *Magniac v. Thompson*, 7 Pet. 348, 393, Judge STORY says: 'Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be, affected by it.' "It does not appear that Mrs. Watson knew or had any reason to believe, that Mr. Watson was insolvent, or indebted even, or that she had any knowledge of his pecuniary condition, except that which she admits in her answer, that he told her he was in easy circumstances and abundantly able to make the conveyance, and that he was regarded in the community as a man of property."

In *Sanders v. Miller*, Kentucky Court of Appeals, 1 Ky. L. J. 244, it was held that property purchased by the husband as agent for the wife and paid for with money given to her by him, in pursuance and fulfillment of an ante-nuptial contract between them made in consideration of marriage, cannot be subjected to the payment of the husband's debts existing at the time the money was paid. Also that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. Upon the second point the court cite *Magniac v. Thompson*, 7 Pet. 393. On the former point the court, referring to *Magniac v. Thompson*,

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continue: "As that case grew out of a marriage settlement actually made before marriage, and in the case before us the settlement was not consummated until after marriage, it is not in that particular a complete authority here. But in the case of *Browning's Admir's v. Coppage*, 3 Bibb, 37, this court held that a contract between husband and wife made before marriage, but not to be operative until after coverture ceased, was not extinguished by the intermarriage under the rule that in general the contracts made between husband and wife, when single, become void by their marriage. And this exception to the general rule is based upon the valuable consideration furnished by her to uphold the contract; and in that case the consideration was her agreement that he should enjoy all of her estate during his life, although she might die without issue. On this point see 3 Bibb, 408. And in a more recent case, *Kinnard v. Daniel*, 13 B. Monr. 500, valuable and meritorious considerations moving from the wife were given their full force in support of settlements made after marriage in pursuance of an ante-nuptial agreement. Roper on Property, vol. 1, p. 303, cited in the case above, says that 'settlements made after, but in pursuance of written articles entered into or letters written before the marriage,' are 'unimpeachable by any persons, whether they be creditors or subsequent purchasers, for the contract of marriage is a valuable consideration, and establishes the settlement against every one.'"

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(103 Ill. 634.)

Negotiable instrument — signing by agent — evidence.

A note in ordinary form, "we promise to pay," was signed, "Samuel L. Keith, President, Chicago Ready Roofing Co.," and at the left was signed, "W. H. Kietzinger, Secretary," and bore the seal of the company. *Held*, that evidence was competent to show the incorporation of the company and the character of its business.

SUFFICIENTLY reported, 39 Am. Rep. 302.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

JERSEY CITY INSURANCE COMPANY v. NICHOL.

(3 Stew. [85 N. J. Eq.] 591.)

Insurance — double — void policy.

A policy of fire insurance, conditioned to be void in case of making any subsequent insurance on the same property not consented to, is not avoided by a subsequent insurance conditioned to be void in case of any other insurance on the same property not consented to.*

ACTION to recover money paid on fire insurance policy. The head-note and opinion show the facts. The action was dismissed below.

Flavel McGee, for appellant.

Wm. H. Morrow, for respondent.

SOUDDER, J. The defense made by the defendants in their answer and proofs is, that the policy obtained by the defendant,

* See *Landers v. Watertown Fire Ins. Co.*, ante, 554.

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Catharine Nichol, in the Millville Insurance Company, after the execution and delivery of the complainant's policy, was void, because of a condition appearing on its face, broken at the time it was made, and which has not been waived by any subsequent act of the Millville company. Both policies contain the condition that "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, then this policy shall be void." The Millville policy has no consent to any other policy written thereon, nor is there any proof that they had knowledge of the complainant's policy until after the fire. By the express terms of this second policy it was, therefore, at the time it was executed, void, because at that time there was a policy issued by the complainants to which no consent was given. The condition for consent was a condition precedent to the vitality of the policy, which was broken as soon as it was accepted by the insured, and the policy never could be enforced at any time if loss by fire had been sustained, nor could any action be maintained on it.

It was different with the complainant's policy, which was valid in its inception, and was only liable to be avoided by some breach of its conditions happening after it was issued and took effect. The principal breach which is claimed, is of the stipulation that if assured shall hereafter make any other insurance on the property thereby insured, without the consent of the company written thereon, this policy shall be void. The exact term used is important, "make other insurance;" not if she shall obtain, or attempt to obtain any other policy of insurance, whether valid or not valid. The difference between a policy and a valid, effectual insurance is here indicated; it is the difference between the instrument and the object sought by it. The rule of interpretation applied to policies of insurance does not admit of any latitude in a construction which will work a forfeiture, and will never be extended beyond the exact words of the policy to reach that result. This rule has been defined in the recent cases of *Carson v. Jersey City Ins. Co.*, 14 Vr. 300, and *State Ins. Co. v. Maackens*, 9 id. 564. While therefore we are constrained to say that the word "void," in the second policy does not mean voidable, or something else than void, although such interpretation works a forfeiture and avoids that instrument, we are also justified in holding that the word "insurance," used in the first policy, is not equivalent to the word "policy," and that the

subsequent policy obtained, being no insurance, creates no forfeiture. There can be no other reasonable conclusion; for a contract of insurance is a contract of indemnity, and if there be no indemnity by its terms, and the contract is void, then there is no insurance, though there may be a policy of insurance in form. The call for an insurance, in fact, is not met by the formal execution of a contract for insurance which is defeated as soon as it is made, by one or more of the provisions or conditions contained in it.

This result does not stand on the construction now given, as a first suggestion, for there is express authority in our State which has been approved and followed in our courts for many years. Since the case of *Schenck v. Mercer Co. Ins. Co.*, 4 Zab. 447, decided in 1854, it has been the settled law with us that where there is a condition like the present one in the first policy, it must be made to appear that the second policy is a valid, subsisting contract, and the showing of a policy void when it was issued is not sufficient to defeat the prior insurance. The case cited is directly in point, and will not be overruled when it so clearly appears to be in accordance with the exact rule of construction applicable to such contracts, and when it is also sustained by the weight of authority in other courts. This support will be found in the following cases, and others that might be cited: *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 23 Pick. 418 (34 Am. Dec. 69); *Clark v. New England Ins. Co.*, 6 Cush. 342; *Hardy v. Union Ins. Co.*, 4 Allen, 217; *Thomas v. Builders Ins. Co.*, 119 Mass. 121; s. c., 20 Am. Rep. 317; *Stacey v. Franklin Ins. Co.*, 2 W. & S. 506; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Philbrook v. New England Ins. Co.*, 37 Me. 137; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St. 402; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; s. c., 20 Am. Rep. 778.

It seems also that the examination of this subject by approved text-writers has led them to the same conclusion. May on Ins. 437; Flanders on Fire Ins. 49, 50; 2 Pars. on Maritime Law, 100; Wood on Fire Ins., § 348.

The cases most frequently cited in opposition to this doctrine are *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402. In the latter case the second policy was treated by both parties to it as a valid, subsisting insurance, and a draft was given by the company, and accepted by the

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insured, to pay the amount of the loss; and in the former the decision appears to have been put upon the ground that the policy could only be defeated by proof of the existence of the extrinsic facts of misrepresentation in obtaining the insurance, which did not render it utterly void *ab initio*, but merely voidable. In that case the court also declined to discuss the cases cited in conflict with the conclusion, and said they were distinguishable from it, and could not be permitted to govern it. These cases and others have been considered in those to which reference has been above made, and it will not be necessary to examine them further, for notwithstanding the great respect to which they are entitled, their reasoning and authority are not sufficient to overcome the weight of opinion against them which has been approved in our own courts. The latest case to which my attention has been directed is *Landers v. Watertown Ins. Co.*,* in the Court of Appeals of New York, reported in 24 Alb. Law Jour. 535 (1881), which appears, from the brief citation there given, to follow the earlier case of *Bigler v. New York Central Ins. Co.*; but whether distinguishable or not from this case under consideration, it can hardly be allowed to change the opinion already expressed.

As there was no actual, valid insurance in the Millville Insurance Company at the time Mrs. Nichol made the proof of her loss to the complainants, there was no fraud which materially affected them in her statement that she had no other insurance on the property; nor in her allegation that the actual value of the house insured, at the time of the fire, was \$2,000, as that was an expression of opinion only, and not a misstatement of a fact material to the insurer.

[Omitting minor points.]

The decree is affirmed, with costs allowed to the respondents in this court.

Decree unanimously affirmed.

* *Ante*, 554.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

LYCOMING FIRE INSURANCE COMPANY V. SCHWENK.

(95 Penn. St. 89.)

Insurance — fire — "riot."

An insurance policy provided that a company should not be liable for fire caused by "invasion, insurrection, riot, civil commotion, or military or usurped power." A coal-breaker insured was burned by a party of men at night, who fired shots and drove away the watchman. *Held*, a riot, without proof of a previous unlawful assembling, accompanied by force or violence.*

ACTION on a fire insurance policy. The head-note states the facts. The plaintiff had judgment below.

George Hill and Joshua W. Comly, for plaintiff in error.

S. P. Wolverton and J. B. Packer, for defendant in error.

GREEN, J. The defendant's sixth point requested the court to say "that if the jury believe that the breaker was destroyed by fire

*See *State v. Brown* (95 Ind. 95), 85 Am. Rep. 210.

in the manner testified by Timothy Adams, their verdict ought to be in favor of the defendant." The seventh point made a similar request as to the testimony of Alfred Ford. Adams had testified that at about eleven o'clock at night, while he was watching at the breaker, "there was a lot of men came up to the breaker through the woods. I first heard them, and I fired a shot; they fired too; they returned the fire and came up right away and set fire to the breaker. I seen some of them; now I couldn't tell you how many I seen that was there. I didn't see any before the breaker was on fire; I seen then may be eight or ten; I can't tell how far they were away from the breaker when they commenced shooting; may be fifty yards or so; they didn't make much noise."

Q. "What amount of shooting was done?" A. "It was a regular volley. I think may be there was fifty shots fired altogether; I heard them coming in the direction of the breaker. * * * I did not go down until they had the breaker on fire; they came right up after the shooting and set fire to the breaker; after they set fire to the breaker I came down and went into the drift. * * * I didn't hear them say much, only when they came they said 'Get out of this;' that is about all I think I heard."

Q. "How did they set fire to it?" A. "They got some fine kindling wood and poured some coal oil on; they hollered for it; one hollered for wood; and the other said 'give me that coal oil;' that I heard; then they set it on fire; it burned pretty rapidly. * * * I can't say I was afraid; I didn't like to stay in the breaker any how; I didn't want to be burned up. * * * I was not in danger of being shot, because I was inside of the breaker; they couldn't shoot through. I was more in danger of the fire than from being shot; I crawled down the plane over their heads."

Ford testified that he also was a watchman at the breaker on the night of the fire, and was in the office immediately before the fire, and heard four shots fired one at a time, and then there was a silence. "After I heard the four shots then there was a lot fired, just about I guess ten or fifteen yards from me; lot of shots, sounded to me like a volley of them. * * * After the shots were fired they plunged into the office, one of the men as soon as that volley of shots was fired, and asked who was there, but there was nobody there; I wasn't in the office at the time; I saw him coming into the office from the back window; I didn't see anybody else there at the time; I heard him ask who was there; I didn't make

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any answer to the question ; I wouldn't have been here if I had, I guess ; I went back of the office down in the bush and concealed myself. * * * I wouldn't like to fight against so many men."

We are decidedly of the opinion that in the foregoing testimony every element of riot is found, whether at common law or under our act of 1705. There was the unlawful assemblage of three or more persons combined together to perpetrate an outrageous and violent crime. The commission of the crime was immediately preceded by numerous discharges of firearms. Two peaceable citizens engaged in watching and protecting the premises, placed there for that purpose, were compelled to flee therefrom in terror of their lives. The crime was arson, one of the most odious known to the criminal law. It was committed at a late hour of the night, when the great majority of persons are in their beds and asleep and least prepared to defend themselves or their property. It is an offense having a more natural and necessary tendency to put whole communities in fear and terror than almost any other. In this instance it was accompanied by the voices of men calling for wood and oil with which to apply the fire, by the loud and appalling noise of exploding weapons of destruction, and the criminals themselves were a band of men whose numbers could not be determined on account of the darkness of the night. For a court in charging a jury to speak of such an occurrence as any thing less than a riot of the most marked and distinct character would be simply to mislead them. We think the learned judge of the court below in his comments to the jury dealt quite too leniently with the plain and undisputed facts of the case. He said to them that to prove a riot there must be a previous unlawful assembling, accompanied with circumstances of force or violence, and "that if the assembling of persons be not accompanied with such circumstances as these it cannot be deemed a riot, however unlawful the acts which they actually committed." From this the jury would naturally infer, that unless the proof went back to the time when the men first met together, and established that such original meeting was attended with circumstances of actual force and violence, a case of riot could not be made out, no matter what acts of outrage and violence were subsequently perpetrated. Such is not the law as we understand it, and we consider it error to say or to intimate that it is to a jury charged with the trial of such a case. We think too that the court rather overstated the necessity of proving "a violent, turbulent, dis-

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orderly and noisy disturbance of the public peace" in order to make out a case of riot. There was no controversy as to what were the facts; not a witness was called to give any other account of the occurrence than that testified to by Adams and Alfred Ford. Their credibility was not assailed or impeached in any manner. It was a case in which it would have been entirely proper for the court to characterize directly the criminal aspect of the facts testified to by the witnesses named. Instead of doing this the learned judge told the jury they must decide whether they believed the witnesses when there was not a shadow of doubt thrown upon their credibility; and if they believe them they are to "determine the facts and circumstances." Whether the facts and circumstances constituted a riot he did not tell them, although expressly requested to do so in two points. In our opinion he should have affirmed the defendant's sixth and seventh points without qualification. For not doing so he was in error, as also in the general charge for the reasons heretofore stated. We sustain the second, tenth, eleventh and twelfth assignments of error, and on these the case is reversed.

Judgment reversed.

 FIRST NATIONAL BANK OF LOCK HAVEN v. MASON.

(95 Penn. St. 113.)

Bank — estoppel as to depositor's title.

A bank that has received money from a customer and credited it to him on its books, may not be heard subsequently to allege that the deposit belonged to some one else.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

C. S. McCormick and Cline G. Furst, for plaintiff in error.

S. R. Peale, for defendant in error.

PAXSON, J. The plaintiff below brought his suit against the First National Bank of Lock Haven, to recover the amount of moneys he had deposited with said bank. The defendant offered

*See *Wood v. Boylston Nat. Bk.* (129 Mass. 356), 37 Am. Rep. 366.

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to prove that the money deposited in the name of James D. Mason, the plaintiff, was in fact the money of the firm of Thomas & Mason, of which firm the plaintiff was a clerk; that the plaintiff had admitted at the time the deposits were made that the money belonged to said firm, and were placed in his name as a matter of convenience in paying small bills; and that the said Thomas & Mason were indebted to the said bank in excess of the amount standing on its books to the credit of the plaintiff. The bank claimed to set off the indebtedness of Thomas & Mason against the claim of plaintiff in this suit. This evidence was rejected by the court below; and forms the subject of the first assignment of error.

Thomas & Mason made no claim to this money. The said firm having failed, the bank seeks to protect itself by setting up their title to the funds in question.

It is well settled that money deposited in a bank to the credit of A. may be shown to be the property of B. It may be reached by attachment on the part of the judgment-creditors of B., or its payment by the bank to A. may be stopped by a proper notice on the part of B. that the money belongs to him. The credit on the books of the bank is but *prima facie* evidence of ownership. *Harrisburg Bank v. Tyler*, 3 W. & S. 373; *Frazier v. Erie Bank*, 8 id. 18; *Jackson v. Bank of the United States*, 10 Barr. 61; *Bank of Northern Liberties v. Jones*, 6 Wright, 541; *Stair v. York National Bank*, 5 P. F. Smith 368; *Arnold v. Macungie Savings Bank*, 21 id. 290. These were cases however in which the true owner set up a claim to the fund. We have here a very different question. The bank, the depositary, sets up an adverse title to defeat the suit of its own depositor. The bank held its claim against Thomas & Mason when the plaintiff made his deposits, and they knew, or at least they allege they knew when the deposits were made, that the money so deposited in plaintiff's name belonged to said firm. Yet under these circumstances and with this knowledge they permitted the plaintiff to make the deposit in his own name. Having received it as the money of the plaintiff and given him credit therefor, the bank is estopped, in the absence of any notice from or claim by the real owner, from disputing the plaintiff's title. Having received the money as the money of the plaintiff, it is bound to pay it to him or upon his order. Such a contract is implied from the fact of the deposit. In *Jackson v. Bank, supra*, the funds in the bank to the credit of Warwick were attached. The bank paid

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the money to Warwick notwithstanding the attachment, and was held liable therefor. It was said by Mr. Justice COULTER, in delivering the opinion of the court: "The first question that occurs is this: could the bank, if the attachment had not been served, have resisted the claim of Warwick to the money he had deposited with them? They received it and the bills as his, entered them on their books as his, and were bound, in the absence of any attachment, to have paid the funds to him. How then were they placed in any better position by the service of the attachment? The attaching-creditor stands in the place of Warwick. If they could not allege as against Warwick that the funds were not his, neither can they allege as against the attaching creditor that they are not his, and yet turn round and pay the money to Warwick to enable him to defeat his creditor."

It is clearly against public policy to permit a bank that has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, to allege that the money deposited belonged to some one else. This may be done by an attaching creditor or by the true owner of the fund, but the bank is estopped by its own act. A departure from this rule might lead to novel results and embarrass commercial transactions.

We are of opinion that the evidence referred to in the first and second assignments was properly rejected.

Judgment affirmed.

BAKER V. ALLEGHENY RAILROAD COMPANY.

(96 Penn. St. 211.)

Master and servant — duty as to machinery — derrick rope.

A servant was killed by the breaking of a rope on the master's derrick on the first day of his using it in the master's work. The rope was two or three years old, had been exposed to the weather, and was rotten although apparently sound. *Held*, that there was evidence of the master's negligence for the jury, and that the servant was not guilty of contributory negligence.*

*See *Holden v. Fitchburg R. Co.* (139 Mass. 268), 37 Am. Rep. 843; *Mullin v. Phila., etc. Co.* (78 Penn. St. 25), 21 Am. Rep. 2.

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TRESPASS on the case for damages for negligently causing the death of the decedent. The opinion states the facts. The defendant had judgment below.

Frank Fielding and George A. Jenks, for plaintiffs in error.

H. T. Beardsley and Wallace & Krebs, for defendants in error.

SHARSWOOD, C. J. The deceased, to recover damages for whose death this action was instituted in the court below, was a laborer employed by the defendants in hoisting stones upon the cars of a gravel train. For this purpose a derrick was used on an upright wooden mast held in place by guy ropes, and while in the act of raising a heavy stone, one of the ropes broke and the mast of the derrick fell with great force on the deceased, inflicting an injury from the effects of which he died within an hour.

Whether the defendants were *prima facie* liable was the question; in other words, did the evidence adduced by the plaintiffs make out such a case as ought to be submitted to the jury? The learned judge below thought not, and accordingly nonsuited the plaintiffs.

The facts in regard to the rope may be briefly stated. It was about two inches thick, and there was every reason to believe that it was originally sufficiently strong for the purpose which it was used. But there was evidence that the derrick was an old structure, and the rope at the time of the accident had been in use two or three years, perhaps more. During this time it had been exposed to the weather. Several witnesses, who examined the rope immediately after the accident, testified that at the place where it had broken it was rotten and unsafe, and there was evidence that such was commonly the result of the exposure of such a rope to the weather for that or a much shorter period of time.

There is no dispute as to the law applicable to such a case. It has been long and well settled. A servant assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence. If it has resulted from the negligence of a fellow-servant in the same employment, he must look to him and not to the master for redress. The master does not warrant him against such negligence. The duty which the master owes to his servants is to provide them with safe tools and machinery where that is necessary. When he does this, he does not however engage that they will always con-

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tinue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself. *Ryan v. Cumberland Valley Railroad Co.*, 11 Harris, 384.

But do these rules apply to such an instrument as a rope used in a derrick which is employed in raising heavy weights? No doubt a perfectly new rope and one to all appearances sound may break, and the master would not be responsible for the consequence, having furnished a rope of the proper size for the purpose, to all appearance sound. But there was evidence in this case, sufficient certainly to make a question for the jury, that such a rope after having been used for a year or more, and exposed during that time, as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope under such circumstances will only last a limited time. It will not do for him to furnish a sound rope and then fold his arms until by actually breaking it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that after such a time he ought to procure a new rope. Is the servant bound to notify the master of that which he knows or ought to know himself without such information? He knows how long the rope has been in use. The servant may not know. In this case the deceased did not know. It appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it.

[Omitting minor matters.]

Judgment reversed, and procedendo awarded.

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EX PARTE STEINMAN.

(35 Penn. St. 280.)

Attorney — disbarment — libel on judge.

Attorneys, who were also editors of a newspaper, published in their newspaper a libellous article, charging a judge with prostituting the machinery of justice to serve party purposes in a certain case. Thereupon proceedings for disbarment were instituted against them, and they were disbarred for misbehavior in office. *Held, error.* (See note, p. 642.)

DISBARMENT proceedings. The opinion states the case. The attorneys had been disbarred, and brought error.

Rufus E. Shapley, A. K. McClure and James E. Gowen, for plaintiffs in error.

H. W. Palmer, John B. McPherson, and S. H. Reynolds, amici curiæ.

SHARSWOOD, C. J. The record before us has been brought up by a writ of error under the act of assembly, approved May 19, 1879, Pamph. L. 66, entitled "An act regulating proceedings against attorneys at law in this Commonwealth." It provides "that in all cases of any proceedings in any court of this Commonwealth against any attorney of said court for unprofessional conduct as an officer of such court, said attorney shall be entitled to a writ of error from the Supreme Court of this Commonwealth, as in civil cases to said court, from any judgment, order or decree of said court against him as such officer, which writ of error shall remove the record and all the proceedings therein to the Supreme Court of this Commonwealth; and it shall be the duty of said court to review the same *de novo*, and the complainant shall have the right to offer new testimony by deposition or otherwise, as said Supreme Court may direct, and upon hearing said court may modify, reverse or affirm said judgment, order or decree of the court below, as the justice of the case shall require." Other provisions are added as to the hearing of the cause in any district, and giving it a preference over all other than homicide cases, and as to the costs, all which, to say the least, are unusual. The remedy by

writ of error, which properly requires two parties, is certainly not the best which could have been devised, and what is meant by reviewing the case *de novo* is not very intelligible, unless it be from what follows that the court is to hear any new testimony which may be offered by the complainant, but not by the court below, or any other parties, if there can be any others. On the whole it is a curious piece of legislative patchwork. How far the provision that this court shall hear new testimony, and decide the case as if it was a new one, consists with that article of the Constitution which prohibits the Supreme Court from the exercise of any original jurisdiction, except in a few specified cases, is a question which does not arise, as the controversy here is presented fully on the record, and we are not asked to look out of it.

The complainants were members of the bar of Lancaster county, and were also the editors of a newspaper published there. They printed in their paper an article very severely reflecting upon the conduct of the court in a certain prosecution in the Quarter Sessions, in which the defendant had been acquitted on an indictment for violating the liquor law. It charged that the acquittal "was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party," and added that as the judges belonged to that party it was "unanimous—for once—that it need take no cognizance of the imposition practiced upon it, and the disgrace attaching to it." We may safely assume that it meant to charge, and did charge that the judge had decided the case wrongfully from motives of political partisanship. We have no hesitation in pronouncing such a publication to be a gross libel on its face. Nothing can be more disgraceful—not even perhaps that of direct bribery—than such an imputation on the motives of judges in the administration of justice.

The court thereupon sent for the complainants, and on their appearance and taking upon themselves the responsibility of the publication in question, entered rules upon them to show cause why they should not be disbarred and their names stricken from the list of attorneys for misbehavior in their offices as attorneys. To this rule they appeared and put in answers respectively, and the rules were afterward made absolute.

Many objections have been raised to the proceeding which we will not stop to consider. We entertain no doubt that a court has jurisdiction without any formal complaint or petition upon its own

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motion to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice and been afforded an opportunity to be heard in his own defense.

No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court. By the seventy-third section of the act of April 14, 1834, Pamph. L. 354, it is expressly enacted that "if any attorney-at-law shall misbehave himself in his office of attorney he shall be liable to suspension, removal from office or to such other penalties as have heretofore been allowed in such cases by the laws of this Commonwealth." We do not mean to say—for the case does not call for such an opinion—that there may not be cases of misconduct not strictly professional which would clearly show a person not to be fit to be an attorney nor fit to associate with honest men. Thus if he was proved to be a thief, a forger, a perjurer, or guilty of other offenses of the *crimen falsi*. But no one, we suppose, will contend that for such an offense he can be summarily convicted and disbarred by the court without a formal indictment, trial and conviction by a jury, or upon confession in open court. Whether a libel is an offense of such a character may be a question, but certain it is that if the libel in this case had been upon a private individual, upon a public officer, such even as the district-attorney, the court could not have summarily convicted the defendants and disbarred them. The office of an attorney is his property, and he cannot be deprived of it unless by the judgment of his peers or the law of the land, this last phrase meaning, as we have been taught by Lord Coke, "due process of law." By the seventh section of the first article of the Constitution of 1874—the Bill of Rights—it is declared that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury." This is a new and very important provision introduced into the Bill of Rights by the Constitution of 1873. It would be a clear infraction of the spirit if not the letter of this article to hold that an attorney can be summarily disbarred for the publication of a libel on a man in a public capacity or where the matter was proper for public investigation or information; for as he certainly does not forfeit his constitutional rights

as a freeman by becoming an attorney, it guarantees to him immunity from all liability to punishment in the case of "the publication of papers relating to the official conduct of officers or men in public capacity where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

But the gravamen of the offense of the complainants was that the publication was a libel on the court of which they were attorneys, and this, it is earnestly contended, was "misbehavior in their office," which gave the court power to exercise summary jurisdiction by removing them.

The duty of an attorney is briefly comprehended in the terms of his oath "to behave himself in the office of attorney according to the best of his learning and ability, and with the good fidelity as well to the court as to the client." Was the publication in question a breach of this oath? Fidelity to the court includes many particulars, but they all evidently concern his official relations. "The sum of the matter," says Chief Justice GIBSON, in *Austin's* case, 5 Rawle, 205, "is that an attorney-at-law holds his office during good behavior, and that he is not professionally answerable for a scrutiny into the official conduct of the judges which would not expose him to legal animadversion as a citizen."

Some of the remarks in the opinion in that case have been much relied on by the learned counsel who argued as *amici curiæ* in support of the action of the court below. But there are two considerations bearing upon the question which now exist, but did not at the time that decision was rendered. The first is the new provision on the subject of the liberty of the press which has been introduced into the Bill of Rights of the Constitution of 1874, and the second is that at that time the judiciary was not elective. Judges in 1835 were appointed by the governor, and their tenure of office was during good behavior. There might then be some reason for holding that an appeal to the tribunal of popular opinion was in all cases of judicial misconduct a mistaken course and unjustifiable in an attorney. The proceedings by impeachment or address were the course and the only course which could be resorted to effectually to remedy the supposed evil. To petition the legislature was then the proper step. To appeal to the people was to diminish confidence in the court and bring them into contempt without any good result. We need not say that the case is altered

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and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a court-house, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system.

In admitting, as he seems to do, that a libel on the court may be a breach of professional duty in an attorney, Chief Justice GIBSON adds a most material qualification: "The motion should be clearly shown to have been the acquirement of an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice." No such motive has been or can be imputed to these complainants. The learned judge who delivered the opinion of the court below imputes no such motive to them. He says: "Their motive, though not openly or at all avowed in the publication, is too obvious to admit of doubt. The least reprehensible motive by which their professional misconduct can be supposed to have been animated is a desire for prominence or notoriety in the editorial corps. The real or true motive could be no other than partisan malice, or a willful headlong zeal to promote partisan interests in the face of their official fidelity to this court and regardless of all consequences." Suppose the motives here assigned to be the true motives which actuated the complainants — a desire for notoriety, partisan malice, and a willful headlong zeal to promote partisan interests — what had they to do with professional conduct or fitness to practice law? The complainants, in their sworn answers to the rule, aver that in making the publication in question, they were "acting in good faith without malice, and for the public good."

Of course we mean to express no opinion upon the merits of the controversy between the court below and the complainants. We con-

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cede to the court all that has been claimed on their behalf, that the publication in fact was a false and malicious libel, and that in making the rule absolute they were actuated by a simple desire to uphold the authority and dignity of the court. If this were a mere question of discretion, we are of opinion their order was a mistake. The act of 1879 gives this court jurisdiction to review the discretion of the court below, and we think it was not in this case wisely exercised.

NOTE BY THE REPORTER.—It may be that these editors rendered themselves liable to an action for libel, and to punishment for contempt on the ground that the publication was calculated to bring the court into disrespect, and impede the administration of justice. The courts however make a distinction between acts and conduct as an attorney and those as a person. These editors made this publication as editors, and not as lawyers. In some cases an attorney has been disbarred for such a want of integrity, displayed in his conduct other than as an attorney, as shows him to be an unsafe and unfit person to practice law. But we believe the courts have never gone further than this. *Dicken's* case, 67 Penn. St. 169; s. c., 5 Am. Rep. 420, illustrates the distinction. There the court refused to disbar the attorney, because he participated in a pretended gift enterprise, but did disbar him, because he conspired to get an opposing attorney drunk in order to gain an advantage of him on a trial. So in *Baker v. Commonwealth*, 10 Bush, 562, an attorney was disbarred for altering a letter written by a judge to the clerk. On the other hand, in the case of *Ex parte*, 3 Dow. P. R. 110, the court refused to strike off an attorney against whom a verdict for a gross libel had been obtained, Lord Lyndhurst saying: "The court will not strike an attorney from the roll, unless for some misconduct in his business as attorney, or where criminal proceedings have been taken against him."

In the case of *re Wallace*, L. R. 1 P. C. 283, an attorney and barrister of the Supreme Court of Nova Scotia addressed "a most reprehensible letter" to the chief justice, severely reflecting on the judges and their general administration of justice, on account of their disposition of certain causes in which he was a suitor. He was suspended from practice by the court, but that order was reversed by the Privy Council. Lord Westbury said: "This letter was a contempt of court." "It was an offense" which "had no connection whatever with his professional character, or any thing done by him professionally." "If an advocate, for example, were found guilty of crime, there is no doubt that the court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll." "When an offense was committed, which might have been adequately corrected by that punishment, and the offense was not one which subjected the individual committing it to any thing like general infamy, or an imputation of bad character, so as to render his remaining in the court as a practitioner improper, we think it was not competent to the court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se*, did not render him improper to remain as a practitioner of the court." In this case too Wallace had refused to apologize for his letter, which charged the judges with submitting to be "lobbied," and deciding causes on out-door statements. In many cases opprobrious and disrespectful language concerning judges has been held not even to be contempt, but this is generally, we believe, because of the limitations of statutes defining contempt.

Innis v. Templeton.

INNIS V. TEMPLETON.

(95 Penn. St. 303.)

Estoppel—married woman's deed.

A married woman, who has imperfectly executed a deed of her real estate to one having knowledge of her coverture, is not estopped from reclaiming the land by the fact that she has received part of the purchase-money and induced the purchaser to make valuable improvements.*

EJECTMENT. The opinion states the case. The defendant had judgment below.

W. B. Chapman & Son and *J. C. Sturgeon & Bro.*, for plaintiff in error.

A. G. Olmstead and *E. R. Mayo*, for defendant in error.

MERCUR, J. The plaintiff seeks to recover the land in question under title derived from Lois M. Innis. By agreement filed the parties waived a trial by jury, and submitted the case to the decision of the court. The facts found and admitted show, *inter alia*, that Mrs. Innis, a married woman, held a title to, and was in the actual possession of, a tract of land called her "homestead." While thus holding and in the possession thereof, she and her husband of the one part, and one Watkins of the other part, entered into an article of agreement, dated the 11th November, 1877, whereby the party of the first part agreed to lease to Watkins fifty acres of said land for the term of fifteen years, for the purpose of obtaining oil; said Watkins agreed to pay one-eighth part of the oil found on the premises, and to commence and complete one oil well in four months from the date of the lease or contract. It was further stipulated if he failed "to comply with this contract, then it is null and void and of no effect." The boundaries of the land on which Watkins might experiment for the discovery of oil were not designated in the writing. There was a contemporaneous parol agreement by which Mrs. Innis might locate six acres so as to cover the buildings occupied by her, and such other lands adjoining as she

* See *Patterson v. Lawrence* (90 Ill. 194), 32 Am. Rep. 22. To same effect, *Buchanan v. Hassard*, 95 Penn. St. 240; *Davison's Appeal*, id. 394.

pleased, and the written lease cover the residue of the fifty-six acres. The court found in fact that she never located the six acres. The land let to Watkins was "wild timber land and uninclosed."

Watkins did not complete nor even commence a well within four months after the date of his agreement. On the 27th March, 1878, he began work on a rig; but it was suspended within a few days and nothing done until July. On the 17th July he began to drill, and on the 22d August completed the first well. The written agreement of the 11th November, 1877, was duly acknowledged by Mrs. Innis and husband. On the 28th August, 1878, they sold and assigned the land to the defendant. The plaintiff seeks to recover on a title acquired from Watkins on the 22d of September following. As the latter did not perform the act necessary to continue the term within the time stipulated in the written contract, it thereby, by its terms, became "null and void and of no effect." The plaintiff claims such effect shall not be given to the failure of Watkins to fulfill his contract for two reasons: one, that there was no sufficient re-entry by Mrs. Innis to make the agreement of forfeiture effective; the other, that a right to declare the forfeiture was waived by a subsequent agreement of the parties to the contract.

[Omitting the first consideration.]

The remaining objection to the forfeiture is the alleged waiver thereof. Conceding that the acts and declarations of Mrs. Innis were sufficient to establish a waiver in case she had been a *feme sole*, yet it is an unquestioned fact that during the whole time she was under coverture. The question then is, were they sufficient to transfer the title of a married woman in real estate or estop her from asserting it?

It is a settled rule of law that a married woman has no capacity to contract for the sale of her real estate, nor to convey it otherwise than in the precise statutory mode conferring the power. *Kirkland v. Hepselgefer*, 2 Grant, 84; *Rumfelt v. Clemens*, 10 Wright, 455; *Glidden v. Strupler*, 2 P. F. Smith, 400; *Dunham v. Wright*, 3 id. 167; *Graham v. Long*, 15 id. 383; *Brown v. Bennett*, 25 id. 420.

The title which she had transferred according to the requirement of the statute on the 11th November, 1877, had reverted to her. It became hers as absolutely and unconditionally as if she had not executed that agreement. Her title then could not be sold without an instrument in writing duly executed and acknowledged by her-

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self and her husband. Without this the instrument as to her was void, and passed no title at law or in equity. *Glidden v. Strupler, supra; Dunham v. Wright, supra.* The fact that she may have received a part or the whole of the purchase-money, in consideration of her agreement, or induced the purchaser to make valuable improvements thereon, is insufficient to pass her title to real estate when the form of transfer prescribed by the statute has not been observed. To hold otherwise would operate as a repeal of the statute which designates the only mode in which a married woman can convey her real estate. *Rumfelt v. Clemens, supra; Glidden v. Strupler, supra; Thorndell v. Morrison*, 1 Casey, 326; *Richards v. McClelland*, 5 id. 385; *Pettit v. Fritz*, 9 id. 118.

The doctrine of estoppel cannot be invoked to enforce the agreement of Mrs. Innis for the sale of her land, when her agreement was otherwise void. Legal incapacity cannot be removed even by fraudulent representations, so as to create an estoppel in the act to which the incapacity relates. Hence it was held in *Keen v. Coleman*, 3 Wright, 299, that a married woman who falsely and fraudulently represented that she was single when she executed a judgment bond, thereby obtaining the consideration therefor, was not estopped from setting up her coverture in defense to a recovery on the bond.

In the present case Watkins knew Mrs. Innis to be a married woman. He knew she had no capacity to sell or convey land without a deed duly executed and acknowledged by herself and her husband. He was not deceived, and had no reason to complain of her subsequent refusal to relieve him from the consequences of his foolish conduct. *Alexander v. Kerr*, 2 Rawle, 90; *Crest v. Jack*, 3 Watts, 238; *Carr v. Wallace*, 7 id. 394; *McAninch v. Laughlin*, 1 Harris, 371; *Hill v. Epley*, 7 Casey, 333.

In some cases a married woman may be estopped from repudiating her executed contract in a sale of personal property; but we are now considering the question of a divestiture of her title to real estate arising on an executory contract.

[Minor matter omitted.]

Judgment affirmed.

LANT'S APPEAL.

(35 Penn. St. 279.)

Marriage — intended husband's ante-nuptial assent to intended wife's will.

An affianced woman executed her will before marriage, having obtained the oral consent of her intended husband. *Held*, valid as an ante-nuptial settlement, although the will was revoked by the marriage by force of statute.

A PPEAL from probate decree. The opinion states the case.

H. M. North, S. H. Reynolds and P. D. Baker, for appellant.

Richard P. White and Thomas E. Franklin, for appellee.

SHARSWOOD, C. J. There are some matters involved in this controversy which must be assumed if not conceded as not in dispute. First that the instrument purporting to be the last will and testament of Elizabeth M. Dunn, dated February 8, 1876, cannot take effect as a will, having been revoked by her marriage with the appellee on the following day. Probate of it was refused by the tribunal having exclusive jurisdiction as far as personal property is concerned, and its decree unappealed from is conclusive. Second, this revocation was by the positive provision of the statute 8 April, 1833, sect. 14, Pamph. L. 250, "A will executed by a single woman shall be deemed revoked by her subsequent marriage." This law was not known to her, and not adverted to by her counsel called in by her to give his advice and prepare the instrument. It was certainly not thought by her that such a result would follow. She did not mean it to be revoked by her marriage. On the contrary, both she and her counsel meant to make a disposition which would be effectual after the marriage which was to be celebrated within twenty-four hours after the paper was executed. The execution of the will at the time and under the circumstances was a plain mistake. Had it been postponed only a few hours until after the marriage ceremony was performed it would have been a valid and effectual disposition of her property. Third, there was a contract made by John A. Mullen, the intended husband, at or about the time the instrument was executed, by which she was to have the

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power "to dispose of her fortune by will or otherwise any way she pleased." That this was the contract is established by the most conclusive testimony, confirmed by the admission of the husband afterward, who put his refusal to give effect to it not on the ground that he had not freely and fairly so agreed, but that because it was not in writing he was not bound by it. In this he was mistaken, for a parol ante-nuptial contract such as this, being in consideration of marriage, which is a valuable one, is unquestionably binding on the parties. *Gackebach v. Brouse*, 4 W. & S. 546. That he knew and considered at the time the instrument in question was executed, that it was intended to carry out and give effect to his ante-nuptial agreement, is proved by the clearest and most convincing evidence.

If, as it has been earnestly contended, the decree of the court below must be affirmed, and the entire personal estate of the decedent awarded to the appellee, then it is not to be disputed that there must be some palpable defect in equitable jurisdiction in this Commonwealth to render necessary so gross an injustice, so revolting to the moral sense of what is right and wrong. We think however that fortunately there are two very familiar and well-settled principles of equity often recognized and applied by our courts which prevent such a result. One of these principles is, that whatever a chancellor on the facts of a case would have decreed to be done the courts will consider as having actually been done. Another principle is, that wherever a person has the legal right to dispose of property and means to do so, the form of the instrument adopted for the purpose, if at law ineffectual, will be disregarded, and it will be reformed so as to be made effectual.

Suppose then that at the time the paper of February 8, 1876, was executed by Elizabeth M. Dunn, she had filed a bill in equity setting forth the ante-nuptial contract made by John A. Mullen and the marriage about to be solemnized and praying that it might be carried into execution by some instrument of writing to be signed by him, what would have been the decree of the court? Surely upon the undisputed facts the prayer of the bill would have been granted, and the decree would have been either that the husband and wife should join in a conveyance to trustees in trust for the separate use of the wife with full power in her to dispose of the same in her lifetime by sale or gift, and after her death by a will in writing or any writing in the nature of a last will and testament.

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Such is the ordinary form of such powers in marriage settlements. If the complainant was willing the court might decree simply that the husband himself should execute a declaration of trust to the same effect. Nothing is better settled than that a court of equity in decreeing the specific performance of marriage articles will make such a decree as will give full effect to the intention of the parties without regard to the legal construction of the words used in them. Thus, if by the words according to their legal construction, a fee-tail would be vested in the parties or either of them, a strict settlement will be decreed to the husband or husband and wife for life, with remainders to the children of the marriage—successively in tail—according to the most approved forms of deeds of marriage settlement. 2 Story's Eq. Jur., § 983, and authorities there cited. Now if we are to consider as having actually been done what a chancellor would have decreed to be done, then we have at the time of the execution of the paper of February 8, 1876, either a conveyance to a trustee or a declaration executed by the husband to the same effect. Surely then, under such a declaration or deed of settlement, this paper, though ineffectual as a will under the statute, was still a writing in the nature of a last will and testament, a clause introduced into such powers for the very purpose of providing against mere technical objections, which would prevent the instrument from being admitted to probate as a will. It was a disposition of property to take effect at death if not revoked by the party during life. That is a writing in the nature of a last will and testament. This paper was so intended beyond all question. It was executed under and in pursuance of the contract on the eve of the marriage—indeed it might almost be said to have been in the consideration of equity contemporaneous with the ceremony—executed for the express purpose with the knowledge and consent of John A. Mullen of having just the effect here stated. It makes most liberal provision for him and upon every principle of equitable estoppel his mouth ought to be shut from interposing an objection to its full enforcement.

The case too is equally within the second principle of equity adverted to; a paper executed by a person who had a perfect legal right to dispose of her property, and intended to do so, but by a plain mistake of the scrivener it was drawn in the form of a will when it ought to have been a deed or declaration of trust. Surely it must be in the power of a court of equity in this Commonwealth

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to correct so gross and palpable a mistake, to reform the instrument and decree it to be such as it ought to have been, so as effectually to carry out the intention of the parties.

Decree reversed and record remitted to the Orphans' Court of Lancaster county, that distribution may be there made according to the principle of this opinion, the costs of this appeal to be paid by the estate.

Decree reversed.

CITY OF ALLEGHENY v. ZIMMERMAN.

(35 Penn. St. 237.)

Nuisance — liberty pole — damages — remoteness.

A liberty pole in a city street is not necessarily a nuisance, and if sound and properly secured and protected, its breaking by an extraordinary wind and injuring a person is too remote for recovery.*

CASE for damages for personal injury. The opinion states the facts. The plaintiff had judgment below.

W. B. Rodgers, city solicitor, for plaintiff in error.

W. D. Moore, for defendant in error.

MERCUR, J. This was an action in case to recover damages for the injury which the defendant in error sustained in one of the streets of the city of Allegheny. In September, prior to the election of 1876, a "liberty pole" was erected in the street by a large number of citizens, as expressive of their political convictions. The street was sixty feet wide, and the pole stood about eight feet from the curbstone and four feet from the gutter, in front of the house of one Myers, who participated in its erection. It consisted of three pieces firmly spliced together and securely held by bands and bolts. It was otherwise secured in place by ropes tied to the chimneys of neighboring houses. It stood for some three or four weeks, when in a severe storm and gale the ropes appear to have broken,

* See *Flori v. City of St. Louis* (69 Mo. 341), 33 Am. Rep. 504; *Bullman v. Ind., etc. R. Co., ante*.

and the pole broke off some forty feet above the ground. The upper part fell, breaking into several pieces, one of which struck the defendant in error, a boy about eight years old, who was standing on the sidewalk on the opposite side of the street.

The court below held the erection of this pole on the street a nuisance *per se*, and if the city authorities, whose duty it was to remove it, had knowledge of its being there and allowed it to remain, and the defendant in error, without negligence on his part, was injured by its falling, the city was liable. The correctness of this view presents the main question in the case.

Any unreasonable obstruction of a highway is a public nuisance, from which an indictment will lie. It is not however every obstruction in a highway that constitutes a nuisance *per se*. When it is not, and whether a particular use is an unreasonable use and a nuisance, is a question of fact to be submitted to a jury. Highways are intended for and devoted to the purpose of public travel, and every person may exercise that right, but in a reasonable manner. Due regard must be had to other rights. Thus stone, brick, sand and other materials necessary to be used in building may be placed in the street in the most convenient manner and suffered to remain for a reasonable time. This may be said to result from necessity in building. But the right to partially obstruct a street does not appear to be limited to a case of strict necessity; it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel. Thus public hacks, by authority of the municipality, may stand in particular parts of the streets awaiting passengers, although the public are thereby excluded from using that part of the street most of the time. So shade trees may stand between the sidewalk and the central part of the street without constituting a nuisance *per se*. They may become a nuisance by disease or decay, yet the mere partial obstruction of a part of the street, when in fact such obstruction does not interfere with the public use, does not create a nuisance. It does not work that hurt, inconvenience or damage to the public, necessary to constitute the offense.

The erection of liberty poles appears to have been almost coeval with the birth of our nation. As the name imports, they were erected to symbolize our liberties and as a mode of proclaiming that we had thrown off all allegiance to the government of Great Britain. At first they appear to have been used as expressive of concurrence

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in the principles embodied in the Declaration of Independence. As time passed on, they began to be erected by each political party of the country to express its greater devotion to the rights of the people. As the object of their erection was patriotic and with a view of inciting a spirit calculated to advance the public welfare, they were placed on highways and public squares. The people so desired it. The municipal authorities assented to it. It is a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people. Unless forbidden by the authorities, it has been considered the exercise of a lawful license incident to citizenship. Hence in this case no permission was asked of the authorities for leave to erect the pole, and no objection was made by them. The travel on the street where it stood was merely local. It did not occupy the street to such an extent or in such a manner that any person complained of its interfering with the public travel. To all appearance the pole was strong and sound. No doubt existed as to its strength. In the view taken by the court below, it mattered not if all these facts were proved; and further, that it was well secured; that no person had reason to apprehend any danger in its remaining there, and that it yielded only to the severe gale, yet having broken, the city was liable for the injury sustained by the defendant in error. If it has been a uniform custom for the people to erect such poles in the streets of the city from its earliest history under the implied assent of the municipal authorities, and if this one was carefully erected, having due regard to the material of which it was formed and the manner in which it was secured, so that a careful and prudent person would have apprehended no danger therefrom, we think it was not a nuisance *per se*. It is therefore a question for the jury whether it was erected in such a place and manner and maintained for so long a time, under all the circumstances, as to have created reasonable apprehension of danger. It did not become a nuisance by reason of the brief time only that it remained, unless there was a change in its safe condition, or some complaint made to or action taken by the city authorities in regard to it. But conceding that the city, at a moment before the injury, might have been indicted for suffering the pole to remain, which we do not admit, it does not necessarily follow that this action for damages can be sustained. Wood on Nuis., § 324; *Fairbanks v. Kerr*, 20 P. F. Smith, 86; s. c., 10 Am. Rep. 664. The question still remains whether suffering the pole to

remain in the street was such a probable and proximate cause of the injury as to make the municipality liable in damages. The defendant in error sustained no injury while the pole was standing there. He does not complain that it interfered with his free use of the street for all purposes of a highway. He came in no collision with it. He complains of no injury special to himself until after it broke and fell. Even if it was a public nuisance, he could not maintain an action for damages without proving some special damage to himself. Wood on Nuis., § 829; *Mechling v. Kittanning Bridge Co.*, 1 Grant, 416.

As a general rule one is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been unseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature. *Morrison v. Davis*, 8 Harris, 171; *McGovern v. Lewis*, 6 P. F. Smith, 231; *Pennsylvania Railroad Co. v. Kerr*, 12 id. 353; s. c., 1 Am. Rep. 431; *Fairbanks v. Kerr*, *supra*; *Scott v. Hunter*, 10 Wright, 192. In the present case the breaking of the pole was the proximate cause of the injury.

If then the jury should find from the evidence that the pole was sound and so secured and protected that careful, prudent and sagacious persons considered it safe, and it was broken by a wind of unusual violence, the injury of the boy was a result too remote from the erection of the pole to make the city liable in damages therefor. Nor did the city become liable if the breaking occurred by reason of a defect in the pole unknown to the city authorities, and which could not be discovered by a careful examination of the pole as it stood.

In so far as the first, second, third and fourth assignments are in conflict with this opinion, they are sustained. There is no error in the fifth, nor as a whole, in the sixth, although some parts of the offer, if presented separately, might be admissible.

Judgment reversed, and a venire facias de novo awarded.

GORDON and TRUNKEY, JJ., dissented from so much of this opinion as overrules the decision of the court below that the erection and continuance of the pole on the street was a nuisance *per se*.

STABLER V. COMMONWEALTH.

(25 Penn. St. 318.)

Criminal law — attempt to administer poison.

Merely delivering poison to one and asking him to put in the spring of a certain other is not "an attempt to administer poison." (*See note, p. 656.*)

CONVICTION of attempt to administer poison. The opinion states the case.

W. C. Moreland, and Newton C. Cook, for plaintiff in error.

John S. Robb, district-attorney, for Commonwealth.

MERCUR, J. This indictment contains six counts. A conviction was had on the first and sixth, and sentence was pronounced on each separately. The first charges a felonious attempt to administer poison to one Waring with intent to commit the crime of murder, and feloniously to kill and murder him; the sixth, with wickedly soliciting one Neyer to administer poison to said Waring. No error is now alleged to the conviction and judgment on the sixth count. The conviction on the first, and the judgment thereon, are assigned for error. This count is framed under section 82 of the act of March 31, 1860, *Purd. Dig.* 340. It declares, "If any person shall attempt to administer any poison or other destructive thing, or shall attempt to cut or stab or wound, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, he shall, although no bodily injury be effected, be guilty of felony, and be sentenced to pay a fine of \$1,000, and undergo an imprisonment, by separate or solitary confinement, not exceeding seven years."

All the testimony to prove the first count was the evidence of Neyer. He testified to a conversation which he had with Stabler more than a year before the information was made against him. His testimony is substantially this. Stabler stated his grievance against Waring, and a determination to be revenged. He solicited witness to put poison in Waring's spring so that the latter and his

family would be poisoned, offering him a reward for so doing. He handed witness the poison, and directed how it should be administered. Witness replied he would have nothing to do with it, and handed the poison back to Stabler. While they were conversing the coat of witness was off; on putting it on three or four days thereafter, he found a package in the pocket, and believed it to be the one that Stabler had handed him. Soon after this witness left the State, and did not return until about a year thereafter. He then for the first time related the conversation to a person, and handed him the package of poison. He further testified that he never had any intention of administering the poison, and never did any thing toward it, and had no other conversation with Stabler about the matter.

Is this evidence sufficient, within the meaning of the statute, to prove an attempt on the part of Stabler, to administer the poison? The act recognizes a distinction between *intent* and *attempt*. The former indicates the purpose existing in the mind, the latter an act to be committed. Merely soliciting one to do an act is not an attempt to do that act. *Rex v. Butler*, 6 C. & P. 368; *Smith v. Commonwealth*, 4 P. F. Smith, 209. In this last case it was said, "in a high, moral sense it may be true that solicitation is attempt; but in a legal sense it is not." In some cases it has been held, although a solicitation to commit a misdemeanor does not constitute an attempt to commit the misdemeanor; yet a solicitation to commit a felony does constitute an attempt to commit the felony. This view does not appear to have been adopted in Pennsylvania. The case of *Kelly v. Commonwealth*, 1 Grant, 484, was an indictment for murder charged to have been committed in an attempt to commit a rape. It was held that acts were necessary to constitute an attempt. That an attempt to commit a rape was an ineffectual offer by force with intent to have carnal knowledge. If such acts, with such intent, were not proved, the prisoner could not be convicted of the attempt; that it should be an actual, not a constructive attempt. An intent to commit fornication was insufficient.

In the present case it is contended that putting the poison into the pocket of the witness was an act sufficient to constitute the attempt, if Stabler expected and believed it would be used as he had requested. The uncontradicted evidence is, that it was so put without the knowledge of the witness, and after his positive and

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unqualified refusal to use it. He swears he never used it or attempted to use it, or had any intention of so doing. To submit to the jury to find that Stabler expected and believed the witness would administer it, was not only without evidence but against the evidence. If however it was actually delivered with that intent, we do not think it constituted an attempt to murder under the 82d section of the act of March 31, 1860. This section is substantially a copy of third section of the act of 1 Victoria, ch. 85. In an indictment under that act, in *Regina v. Williams*, 1 O. & K. 589, it was held, that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was insufficient to establish an attempt to murder. So on an indictment under the same chapter for attempting to discharge loaded firearms at a person, it was held, in *Regina v. Lewis*, 9 C. & P. 523, that some act must be shown to prove the person did attempt to discharge the firearms, and merely presenting them was not sufficient. Upon an indictment for attempting to discharge a pistol loaded with powder and ball with intent to murder, a witness testified, "the prisoner took out a small pistol and said, 'I will settle you,' or 'I will do you,' and either half or full cocked the pistol, and pointed the muzzle at my brother," with his finger on the trigger; yet it was held the charge of felony could not be supported, as it was not proved that the prisoner drew the trigger. *Reg. v. St. George*, id. 483 (38 E. C. L.). PARKE, B., said: "Here a trigger was to be drawn, and it is not drawn. It seems to me the object of this act was to punish proximate attempts, that is those attempts which immediately lead to the discharge of loaded arms." It is true, in *People v. Bush*, 4 Hill, 133, a conviction was sustained for an attempt to commit a felony, where the act proved was as remote from the crime intended to be perpetrated as the act proved is in the present case. That ruling however rests on a statute of New York, which contains language not in the act of 1 Victoria, cited, nor in our own statute. It has the additional words, "and in such attempt shall do any act toward the commission of such offense." In giving construction to a statute containing such language, a conclusion may well be reached, that would be forced and unjust in construing our statute which is so different.

The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offense for which an indictment will

lie without any further act having been committed. He was rightly convicted therefore on the sixth count.

We however think all that occurred at the interview with the witness, and the legal inference deducible therefrom, followed by no other act, are not sufficient to justify a conviction for an attempt to commit the felony as charged. The act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it within the meaning of the statute.

The second and third assignments are sustained; and on the first count,

Judgment reversed.

STERRETT, J., dissented.

NOTE BY THE REPORTER. — Some discussion has arisen as to whether solicitation is an attempt. It seems to be mainly a dispute about words. Solicitation to commit crime has often been punished as solicitation. It was punished in the principal case, under the sixth count of the indictment, and no question was made. So to incite a servant to steal his master's goods (*Reg. v. Quail*, 4 F. & F. 1076); to make overtures to one to commit sodomy (*Reg. v. Hickman*, 1 Moody, 34); or adultery, where adultery is criminally punishable (*State v. Avery*, 7 Conn. 298; 18 Am. Dec. 106); to incite to larceny (*Reg. v. Higgins*, 3 East, 5); to request one to post up a threatening notice (*Reg. v. Darcy*, 1 Crawford & Dix, 33); to merely offer a bribe (*U. S. v. Worral*, 2 Dall. 384); all these are indictable as solicitations.

But whether these solicitations are indictable as attempts has been questioned and denied. Wharton says, 1 Cr. Law, § 179: "But to make bare solicitations or allurements indictable as attempts, not only unduly and perilously extends the scope of penal adjudication, but forces on the court psychological questions which they are incompetent to decide, and a branch of busia in which would make them despots of every intellect in the land. What human judge can determine that there is such a necessary connection between one man's advice and another man's action, as to make the former the cause of the latter? An attempt, as has been stated, is such an intentional guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard any solicitations as indictable, when there is interposed between the bare solicitation, on the one hand, and the proposed illegal act, on the other, the resisting will of another, which other person refuses assent and co-operation." Thus it has been held that solicitation to commit adultery is not indictable at common law (*Smith v. Com.*, 54 Penn. St. 209; *Kelly v. Com.*, 1 Grant, 484); and so of endeavoring to persuade to incest (*Cox v. People*, 82 Ill. 191); or to sell liquor. *Com. v. Willard*, 22 Pick. 476. "We must, however," continues Wharton, "remember that such solicitations, when in any way attacking the body politic either by way of treason, scandal, or nuisance, are, as has already been seen, under any view of the case, indictable as independent offenses."

Mr. Bishop, on the other hand, severely criticises the doctrine of *Smith v. Com.*, and *Cox v. People*, *supra*. He says (1 Cr. Law, § 768 c.): "The law as adjudged holds, and has held from the beginning, in all this class of cases, an indictment sufficient which simply charges that the defendant, at a time and place mentioned, 'falsely, wickedly and unlawfully did solicit and incite' a person named to commit the substantive offense, without any further specification of overt acts. It is in vain, then to say that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offense." Of Mr. Wharton's distinction, which Mr. Bishop attributes to *Cox v. People*, he observes: "It is, that solicitations to offenses which are

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breaches of the peace, or corrupting to the body politic as interfering with public justice, are indictable attempts, but other solicitations to crime are not. * * * The learned Illinois judge well observed, that there are respectable authorities holding to a different rule from the one he was laying down, * * * it is believed that there is no single authority, respectable or otherwise, prior to this Illinois one, even by implication maintaining the distinction. * * * No difference between classes of offenses of equal turpitude, as measured by the law's standard, the punishment, can in reason be assigned."

On the contrary, Mr. Wharton suggests the absurdity of indicting Lord CHESTERFIELD for advising his son, in his letters, to form illicit connections with married women.

The decision of *Cox v. People* is mainly founded on Mr. Wharton's doctrine as above laid down. But as we said in the outset, the true doctrine probably is, that any direct mere solicitation to commit a specific criminal offense against a particular individual, or the community, although not consummated, is indictable as a solicitation, but not as an attempt.

PALMER V. GILLESPIE.

(95 Penn. St. 340.)

Limitation — statute of — promise to tell.

There need not be an express promise to take a demand out of the statute of limitation, but a clear, distinct, and unequivocal acknowledgment of the debt, consistent with a promise to pay, will suffice for the law to imply a promise.*

DEBT. The opinion states the point. The plaintiff had judgment below.

West McMurray, for plaintiff in error.

Hampton & Dalsell, for defendant in error.

MERCUR, J. This contention relates to the allowance of a set-off claimed by the plaintiff in error. His right thereto is alleged to have arisen on this statement of facts: A purchase of oil lands was contemplated, in which both these parties and some others should be interested. The purchase was to be made in the name of the defendant in error; but in fact for the benefit of all who contributed toward the purchase-money, according to the amount subscribed by each respectively. The plaintiff in error testified that for this purpose he put \$750 into the hands of the defendant in error; but the latter did not so invest it, and afterward promised

See *Norton v. Shepard*, ante, 157.

to pay it back to him. Evidence was given tending to show that one piece of land was purchased by him, and deed therefor taken in his name, and that he afterward conveyed the same to one Hailman without declaring any trust therein for the plaintiff in error. Whether any right of the latter in the land was then recognized to exist is a question in dispute. It seems however if any was recognized it was not equal to the whole \$750. This sum had been advanced by the plaintiff in error in two installments. The first of \$250, the latter of \$500. This suit was brought more than six years after the money was thus advanced. To avoid the effect of the statute of limitations, the plaintiff in error relied on promises or admissions of indebtedness alleged to have been made within the six years. The learned judge charged substantially, that notwithstanding the defendant in error may have kept this money, and did not invest it in the oil property, yet as that was more than six years before suit brought, to make him liable it was necessary that he "should make an actual promise to pay within the six years; should admit it, and say he would pay it before" he would now be liable therefor. Again he charged, "now the transaction being more than six years old at the time of the bringing of this suit, unless there was a promise to pay it, it would not avail."

In so charging we think the learned judge erred. It is not essentially necessary that the promise be actual or express, provided the other necessary facts are shown. A clear, distinct and unequivocal acknowledgment of a debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise without its having been actually or expressly made. There must not be uncertainty as to the particular debt to which the admission applies. It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning: *Fries v. Boisselet*, 9 S. & R. 128; *Bailey v. Bailey*, 14 id. 195; *Allison v. James*, 9 Watts, 350; *Gilkyson v. Larue*, 6 W. & S. 213; *Hazebaker v. Reeves*, 2 Jones, 264; *Davis v. Steiner*, 2 Harris, 275; *Johns v. Lantz*, 13 P. F. Smith, 324. In this last case it was said by the present chief justice, "no case however has ever gone the length of saying that there must be an express promise to pay in terms." *Watson's Executors v. Stern*, 26 P. F. Smith, 121, and *Senseman v. Hershman*, 1 Norris, 83, declare the rule to be as stated in the cases we have cited.

Miller v. Baschore, 83 Penn. St. 356; s. c., 24 Am. Rep. 187,

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was not intended to overrule the long line of preceding cases. The generality of the language therein used must therefore not be understood as requiring an express promise; but a promise that may be clearly implied. The rule as held in the other cases cited was approved and declared in *Rider v. King*, decided last spring at Harrisburg.

Inasmuch as the jury might find, under the evidence, that at least one part of the money was in fact never invested in land, the language covered by the first assignment may have been calculated to mislead them. It appears to assume that both sums should be held as one payment. The evidence bearing on each ought to be separately presented to the jury. This can be done on the next trial.

Judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

HENSEL V. NOBLE.

(25 Penn. St. 345.)

Bailment — Lien — for repairs — extent of.

Under a contract for repairing several articles for a gross sum, the person repairing has a lien on all the articles for the repairs on any.

TROVER and conversion. The opinion states the facts. The plaintiff had judgment below.

A. Blakeley, for plaintiffs in error.

J. R. Harbison, for defendant in error.

STERRETT, J. The amount in dispute between the parties to this contention did not in the outset exceed a dollar and a half. If we were to adopt that sum as the proper standard of its magnitude, the case would be a very small one, so small indeed as to bring it almost within the maxim, *de minimis non curat lex*; but perhaps neither the luxury of a lawsuit, nor the importance, in the eyes of the parties, of the legal principles it may be supposed to involve, should be measured by such a petty rule as that. Whether prompted by the love of litigation, pure and simple, or by the more laudable

desire to promote the cause of justice generally by settling mooted questions of law, etc., parties have at least an abstract right to try little cases, and bring them here for revision. When it is their sovereign pleasure thus to occupy their own time, as well as that of the public, it is our duty to hear them as patiently, and consider their cases as carefully as if they involved thousands of dollars, instead of a few cents; one thing is quite certain, that in the end the winner will invariably be loser at least in a pecuniary point of the view. That however is his affairs, not ours.

It was admitted by both parties that they had made a special contract in regard to renewing wagon tire, but they disagreed as to whether it was for the renewal of the tire on one or two wheels. The plaintiff below claimed and introduced testimony tending to prove that defendants were to repair one of his wagon wheels for \$1.50; that when the tire was put on he tendered that sum, and demanded the wheel, but they refused to accept the tender or deliver the wheel. On the other hand, the defendants' testimony tended to prove that the contract was to renew the tire on two wheels for the sum of \$3; that while they could do this they could not afford to repair one wheel only for half that sum, inasmuch as tire of an odd size was required, and three bars of iron would repair both wheels, but in repairing one only there would necessarily be some waste; that the plaintiff delivered one wheel to be repaired, and promised to leave the other on the following day; that they purchased the three bars of iron, repaired the one wheel, cut, welded, and bent the iron for the other; that plaintiff tendered \$1.50, and demanded the wheel, saying that he would not have any thing done with the other, and that standing upon their agreement to repair both as an entire contract, they refused to accept the money and deliver the wheel that was then repaired.

It was of course for the jury to determine which of these versions of the contract was the true one. If they found that it was as claimed by the plaintiff the defendants were clearly in the wrong; but if they came to the conclusion that the contract was to repair both wheels together for \$3, then the plaintiff below had no right to demand the wheel without first paying or tendering the price of repairing the one together with at least sufficient to compensate for the labor, etc., expended in preparing to repair the other also.

It cannot be doubted that a lien is given by the common law to a tradesman or artisan, who in the course of his trade or occupa-

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tion receives personal property upon which he bestows labor, etc.; and his right to a lien on the property is equally good whether there be an agreement for a stipulated price, or only an implied contract to pay a reasonable compensation: Story on Bailments, §§ 440, 441a; *Matthias v. Sellers*, 5 Norris, 486. It is equally clear on principle, as well as authority, that where there is an entire contract for making or repairing several articles for a gross sum the tradesman has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed upon for repairing the whole, but for such amount as he may be entitled to for labor, etc., bestowed upon all the articles embraced in the contract. *Blake v. Nicholson*, 3 M. & Selw. 167; *Chase v. Westmore*, 5 id. 180.

The learned judge instructed the jury, "That if the parties did agree that the defendants would repair two wheels for the plaintiff, for which he was to pay them \$3, and the plaintiff, after defendants had repaired one wheel, came and demanded the wheel, and tendered a sufficient amount to pay for the repair of that wheel, the defendants were bound to give it to him." In this we think there was error. If the contract was entire, and defendants in pursuance of it had not only repaired one wheel, but had also bestowed labor, and incurred expense for the purpose of repairing the other, their lien on the one wheel in their possession was good for the whole amount of their labor and expense done and incurred in pursuance of their contract, not exceeding the sum fixed by the agreement. He also charged the jury, as complained of in the second assignment, "That defendants had a right to retain the wheel until the price agreed upon for repairing the wheel, or a fair and reasonable compensation for the work done was tendered." If by "the work done," was meant the labor, etc., bestowed in repairing the one wheel alone, this instruction was also erroneous. If the plaintiff below had a right to the wheel on paying or tendering a fair and reasonable compensation for the work done on it alone, the defendants would have been left without any security for the amount to which they were entitled for labor performed and expense incurred, in pursuance of their contract, in preparing to renew the tire on the other wheel. Be this much or little, if the contract was entire, they were entitled to their lien for the same.

Judgment reversed, and *venire facias de novo* awarded.

Judgment reversed.

Adams v. Pittsburgh Insurance Company.

ADAMS V. PITTSBURGH INSURANCE COMPANY.

(95 Penn. St. 348.)

Custom—of steamboat captains to insure boats.

A general and notorious custom of steamboat captains at large river ports to insure their boats and execute premium notes therefor is reasonable, and valid as against the owners.

ASSUMPSIT on an insurance premium note, executed by the captain of a steamboat for the owners on account of insurance thereon, at the home port. The plaintiff had judgment below.

W. G. Guiler and D. T. Watson, for plaintiff in error.

A. M. Brown, for defendant in error.

MERCUR, J. "*Consuetudo*," said Sir Edward Coke, "is one of the main triangles of the laws of England; those laws being divided into common law, statute law and particular customs, for if it be the general custom of the realm, it is part of the common law:" Co. Lit. 113-15. "A custom used upon a certain reasonable cause depriveth the common law:" Littleton, p. 112, § 169. In *Vanhearth v. Turner*, Winch. Rep. 24, Chief Justice HOBART said: "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice, and if any doubt arise to them about the custom they may send for the merchants to know their custom." That a custom so general and notorious may exist as to authorize the captain of a steamboat to effect an insurance on it for the benefit of the owners without their express directions, we think well settled by authority. It would not be in conflict with any statute, nor would it be unreasonable or contrary to public policy. In *Vanness v. Pacard*, 2 Pet. 148, it was held that evidence was properly received to prove that a custom and usage existed in the city of Washington which authorized a tenant to remove any building erected by him. In *Gordon v. Little*, 8 S. & R. 533, it is held, a usage or custom varying the liability of common carriers by water from that of the common law may be proved, even to give construction to the words "inevitable dangers of the rivers." The usage of trade in respect to particular

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voyages, or risks to which a policy of insurance relates, has always been invoked to give construction to its meaning. Park on Ins. 30. Usage may add a new construction variant from the face of the instrument, as much as if it had been contained in a new clause or by a reference to it. *Eyre v. Marine Ins. Co.*, 5 W. & S. 116.

It is well settled, as a general rule, that the intention of the parties to a contract shall prevail unless it be to do something either *malum in se*, or *malum prohibitum*. *Snowden v. Warder*, 3 Rawle, 101.

A custom so long persisted in as to be known and practiced by a community is the law of the particular business in which it exists. Such a custom is presumed to be in the view of the parties when they contracted about its subject-matter. *McMaster v. Pennsylvania Railroad Co.*, 67 Penn. St. 374; s. c., 8 Am. Rep. 264; *Carter v. Philadelphia Coal Co.*, 27 Penn. St. 286. To make a usage obligatory on the parties, it should be so well settled that persons engaged in the trade must be considered as contracting in reference to it. No particular period of time is requisite to the establishment of a usage so as to affect contracts; 1 Phil. on Ins. 83. The true test is that it has existed a sufficient length of time, not only to have become generally known to the dealers who are to be affected by it, but also to warrant the presumption that contracts are made in reference to such usage or custom. *Smith v. Wright*, 1 Cai. 43; *Snowden v. Warder*, *supra*. This rule is especially applicable to commercial transactions, and either party to such a contract may prove the usage. *Id.* In all matters of trade usage is of vital importance, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. Phil. on Ins. 80. There is a great necessity for giving effect to a custom in regard to the insurance of a steamboat in the custody of one not the owner. The perils of navigation are so well known, that a due regard for some indemnity against loss is justly recognized as a necessary precaution. Hence it was held in *Oliver v. Green*, 3 Mass. 134, that a part owner of a vessel who had chartered the other part with a covenant to pay the value in case of a loss, might insure the whole vessel as his property, without disclosing that he had a special property only, in a moiety thereof. So in *DeForest v. Fulton Fire Ins. Co.*, 1 Hall, 94, it was held that a commission merchant might recover on a policy of insurance for goods in his possession, destroyed by fire, beyond the value of his

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property therein, without any express orders from the consignors of the goods to effect such insurance, on proof that such was the usage of commission merchants in the city of New York.

The remaining question is, was the evidence sufficient to submit to the jury to find the existence of the custom alleged? To establish its validity the usage must have existed so long as to have become generally known, and it must be clearly and distinctly proved. The law prescribes no certain number of witnesses to establish the fact, although the concurring testimony of a large number may increase the probability of its being generally known. Where evidence is admitted, the witnesses must be confined to the fact of usage, and not be allowed to give their opinions. *Gordon v. Little, supra*, and cases there cited.

[Omitting this discussion.]

Judgment affirmed.

GORDON and STERRETT, JJ., dissented.

CAULEY v. PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY.

(35 Penn. St. 328.)

Negligence — contributory — infant trespasser on railway track.

Except at public crossings, a railway company owes no duty to a young child on its track, nor to the child itself. (*See note, p. 667.*)

ACTIONS on the case by a minor and his father, respectively, for damages for injury to the minor's person by negligence. The child was seven years old, and at the time in question was playing on a flat car standing on defendant's track. The defendant had judgment below.

A. M. Watson, for plaintiff in error.

Hampton & Dalzell, for defendant in error.

PAXSON, J. It was said by Mr. Justice STRONG in *Philadelphia & Reading Railroad Company v. Hummell*, 8 Wright, 278: "It is time it should be understood in this State that the use of a railroad track, cutting or embankment is exclusive of the public

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everywhere except where a way crosses it." The same doctrine has been reiterated again and again in subsequent cases. In *Mulherin v. Delaware, Lackawanna & Western Railroad Company*, 31 P. F. Smith, 366, it was said: "Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company has not only a right of way, but it is exclusive at all times and for all purposes," and *Railroad v. Norton*, 12 Harris, 465, was cited in support of this rule. Many other cases might be referred to were it necessary. We live in an age of steam and of rapid development. The world demands quick transportation. Increased speed necessarily involves increased danger. Holding, as we do, such corporations to a strict responsibility for negligence, it is our duty to give them a clear track. This rule is not only proper in itself but is necessary for the preservation of life. Its propriety is no longer a subject for discussion.

It ought also to be equally well understood that parents who permit their children to trespass upon the track of a railroad are guilty of negligence. It is not only gross but culpable negligence, as it imperils the lives of the children so trespassing, as also the lives of the travelling public. A similar view was taken in *Railroad Company v. Hummell, supra*, where it was said that children "cannot be upon the railroad without a culpable violation of duty by their parents or guardians. It is very clear therefore that as to the suit brought by John Cauley in his own right for the injury to his son, he cannot recover. The child was upon the car where he ought not to have been, by the negligence and want of care of his father. Nor does the offer of evidence ruled out by the court below tend to rebut the presumption of negligence on the part of his parents. On the contrary, it strengthens it. Assuming the offer to be true, it shows that the child was not only playing upon the car on the occasion when he received the injury, but that he had done so before. The location was near his parent's house, probably in sight, as his mother saw the accident and called to the conductor. That the child was there without his father's consent is not to the purpose. "To suffer a child to wander upon the street has the sense of permit. If such permission or sufferance exist it is negligence." *Philadelphia & Reading Railroad Co. v. Long*, 25 P. F. Smith, 265. I apprehend few parents would consent to a child's playing upon a railroad track or any other known place of danger. But many parents might neglect the precautions necessary to prevent it. In

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some instances it would require more than merely to caution a child against it. Positive prohibition followed by punishment for violation may sometimes be necessary. It too often happens that boys are allowed to wander about the streets and trespass upon railroad tracks with very little care or supervision of their parents. Whilst so engaged injuries of this character are likely to happen. Much as they are to be deplored and however much our sympathies may be aroused for one so injured, it would be unjust to compel a corporation or individual to make a pecuniary compensation for such accident, when it was the result of the lawful pursuit of a lawful business by such corporation or individual. Aside from this the defendant company owed the father of this child no duty. The father owed his child the duty of protection. The company did not. The evidence was properly rejected.

In regard to the suit brought for the child by his father as his next friend, it is sufficient to say that the child being unlawfully upon the car, the defendant company owed it no duty and is not liable for the injury. This was the principle upon which *Railroad Company v. Hummell*, was ruled. In the recent case of *Duff v. Allegheny Valley Railroad Co.*, 10 Norris, 458; s. c., 36 Am. Rep. 675, it appeared that a conductor of a train, in violation of the rules of the company, permitted a boy to sell papers on the train. By the alleged negligence of the company the boy was killed. The right of his mother to recover was denied upon the ground that the boy was a mere trespasser and the company owed him no duty. It is useless to multiply authorities. The rule is well settled and is sustained by reason and authority. Moreover, it is demanded by humanity. There are many unfeeling parents who not only neglect but maltreat their children. It would be cruel to such children to lay down a rule which would make it an object for unprincipled parents to expose them to injury and death upon a railroad track.

Upon the merits these judgments ought to be affirmed. But we notice that one writ of error has been taken to the two cases. There is no authority for this. It is a practice that we will not encourage. Besides the Commonwealth loses the tax upon one writ. There should have been a separate writ of error to bring up each case. We have expressed our opinion upon the merits to avoid having our time occupied with the cases again. But we will not enter judgment.

Writ quashed.

TRUNKY and STERRETT, JJ., concurred in quashing the writ, but dissented from this opinion.

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NOTE BY THE REPORTER. — See *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513; s. c., 38 Am. Rep. 67, and note, 72.

In *Gillespie v. McGowan*, Pennsylvania Supreme Court, April 24, 1882, the defendant owned an abandoned brick yard with an open and unguarded well in it, in plain sight, about one hundred feet from the highway. The public were accustomed to cross the field, but the paths were somewhat distant from the well. The nearest dwelling-house was three hundred yards off. A boy eight years old was found drowned in the well. He fell in by daylight. The Common Pleas sustained a verdict for the plaintiff, but this was reversed by the Supreme Court. The court observe: "A boy playing upon its edge might fall in just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where the boys of all ages congregate in large numbers for fishing and other amusements. Vacant brick yards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds, and leave the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover it would charge the duty of the protection of children upon every member of the community except their parents."

The ruling below was based upon *Hydraulic Works Co. v. Orr*, 83 Penn. St. 328. In that case a child six years old strayed from a street, through a gate marked "private" and "no admittance," but sometimes left open, into a private alley, and was there killed by the falling down upon it of a movable platform used in shipping goods. The court instructed the jury that "a child cannot be treated as a trespasser or wrong-doer," and that "persons who hold premises opening on public thoroughfares must use them in such a way as to protect those who might accidentally stray upon them." This instruction was affirmed. The court said among other things: "The gate and passage-way opened out upon a public and much frequented street, where persons were passing and children playing. Unlike an ordinary public alley this passage was often open and therefore liable to the incursions of children, and even grown persons, from thoughtlessness, accident or curiosity, * * * this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society, * * * he had good reason to expect that one day or other, some one, probably a thoughtless boy, in the buoyancy of play, would be led there, and injury would follow." *Paxson, J.*, dissented. But in the principal case this case is distinguished on the ground that the defendant "maintained upon its premises what this court designated as a dangerous and deadly trap, weighing over eight hundred pounds, and liable to fall at any moment and crush children beneath it like mice in a dead fall." It was in the heart of the city, close to a public highway, and the access to it frequently left open; and it was moreover so constructed as not to give any indication of its danger." So far as it was intended to sanction the doctrine that "a child cannot be treated as a trespasser or wrong-doer," it is explicitly overruled by the principal case. The principal case also dissents from the doctrine laid down in it at the trial, that "the owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them to protect those who stray upon them and are accidentally injured," asserting that it is in direct conflict with *Gramlich v. Wurst*, 86 Penn. St. 74; s. c., 27 Am. Rep. 694, in which it was held that "where the owner of land, in the exercise of lawful dominion over it, makes an excavation thereon, which is such a distance from the public highway that the person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained." In that case the defendant had made an excavation within eighty feet of a street in Philadelphia, and it was unguarded; but the court held the owner was not liable. The well-established principle in such cases is that "where an

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excavation is made adjoining a public way, so that a person walking on it might, by making a false step or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different." The same doctrine was asserted with much force by Chief Justice Ginsox, in *Knight v. Abert*, 6 Barr, 472, where he said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risk incident to it. If it were not so, a proprietor could not sink a well or a saw pit, dig a ditch or a mill-race, or open a stone quarry or a mine hole on his own land, except at the risk of being made liable for consequential damages from it, which would be a most unreasonable restriction of his enjoyment."

Granlich v. Wurst, and the cases there cited were however cases of adult sufferers and trespassers.

Whether it is negligent in a railroad company to leave a "turn-table" unlocked and unguarded in a place accessible to small boys, so that they may hurt themselves while playing with it, has been variously decided. The affirmative is held in *Kansas City Ry. Co. v. Fitzsimmons*, 22 Kans. 493; s. c., 31 Am. Rep. 203; *Keffe v. M. & St. P. R. Co.*, 21 Minn. 207; s. c., 18 Am. Rep. 333; (in *McAtpin v. Purcell*, 70 N. Y. 126; s. c., 26 Am. Rep. 555, the court say *obiter* of these cases, "we are not prepared to uphold these cases"); also in *Eranstich v. G. E. & S. P. R. Co.*, Texas Supreme Court; the contrary in *St. Louis, etc., R. Co. v. Bell*, 81 Ill. 76; s. c., 25 Am. Rep. 269. The question also incidentally arose in *Railroad Co. v. Stout*, 17 Wall. 657, and *Koons v. St. Louis, etc., Co.*, 75 Mo. 562. In *Kansas Central R. Co. v. Allen*, 22 Kans. 285, a similar action, the court thus describes the restless small boy: "Everybody knows that by nature and by instinct boys love to ride, and love to move by other means than their own locomotion. They will cling to the hind ends of moving wagons, ride upon swings, swing upon gates," (add swing-bridges, *Gavin v. Chicago*, 97 Ill. 66; s. c., 37 Am. Rep. 99); "slide upon cellar-doors and the rails of staircases, pull sleds up hill in order to ride down upon them on the snow, and even pay to ride upon imitation horses and imitation chariots swung around in a circle by means of steam or horse power. This last is very much like riding around in a circle upon a turn-table. Now everybody knowing the nature and instinct common to all boys, must act accordingly. No person has a right to leave, even upon his own land, dangerous machinery calculated to attract and entice boys to it, there to be injured, unless he first takes proper steps to guard against all danger; and any person who thus leaves dangerous machinery exposed, without first providing against all danger, is guilty of negligence."

But the Kansas court, in *Central Branch, etc., R. Co. v. Hentgh*, 23 Kans. 347; s. c., 33 Am. Rep. 167, distinguish such cases as the last and hold more in accordance with the principal case. Here a boy, four or five years old, climbed on a railroad car, standing on a switch track, on a slightly descending grade, with brakes fastened, unfastened the brakes and thus started the car, and then jumping or falling off was run over and killed. The defendant was held not liable. The court observed: "The cars were not dangerous machines left exposed near a populous city. Nor were they of that alluring character to entice boys to play upon them, for when unfastened they would move only a few feet and then stop. Nor were they dangerous, even when moving, to ordinary boys. Certainly boys from ten to sixteen years of age are not likely to be hurt by them. No one could have anticipated that a boy less than five years of age would have gone to the cars unaccompanied by any older person and have climbed upon one of them and unloosened the brake, so as to set the car in motion. No such thing ever occurred before, and certainly no one could have anticipated that a boy big enough to do that would have fallen off or jumped off in front of the car so that the car would have run over and killed him. The most of boys would have stayed on the car so as to get a ride. And this the company had a right to expect."

From persons who leave dangerous openings, erections, machines, or other things exposed in or directly adjacent to streets or other public places, a different measure of care is of course exacted. As in *Lynch v. Nardin*, 1 Q. B. Div. 20, where a horse and wagon

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were left unfastened and unattended in a public street, and a boy, seven years old, climbed on the cart, other children started the horse, and the boy was injured. And to the same effect, *Lane v. Atlantic Works*, 107 Mass. 104; s. c., 111 id. 136. And so in *Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319, where an elevator opened on the street by a sliding door, and the door being left open and unguarded, a child four years and a half old, approached the opening and was injured by a descending car. And so in *Birge v. Gardiner*, 19 Conn. 507, where the defendant had set up a gate on his own land, by the side of a lane through which a child, six or seven years old, with other children, was accustomed to pass between his residence and the highway, and in passing put his hand on the gate and shook it and caused it to fall and injure him. The court said it was properly left to the jury to say "whether the acts done by him were not rather the result of childish instinct, which the defendant might easily have foreseen." So in *Whitely v. Whitman*, 1 Head, 610, where a cogwheel, connected with machinery in a mill, was left revolving, unguarded and exposed in an open, uninclosed, unguarded space, about twenty feet from the highway, and a child, three years old, who lived across the street, was caught and injured while playing about the wheel. So in *Abbott v. Macfie*, 2 H. & C. 744, where the defendant owned a warehouse, with a cellar in front, in a public street, opening with a flap or lid, raised and leaned against a wall, and a child, five years old, was hurt by the falling down of the lid.

But on the other hand, in *Wood v. Independent School District*, 4 Iowa, 37, it was held not negligent to leave a well-drilling machine unlocked and unguarded in the yard of a public school-house, whereby one of the young investigators of science was injured, outside of the school "drill." The court said: "We are not prepared to hold that every person having upon his premises machinery, tools, or implements which would be dangerous playthings for children, and in their nature affording special temptation to children to play with them, is under obligation to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children were rightfully on his premises. It would be improper to burden the mechanical industries of the country by such a rule. Without holding therefore that these may not be pieces of machinery so peculiarly dangerous that a right of action would exist at common law for injuries received from them if left unguarded, we do not think the drilling-machine in question is such machinery." (Stress however was laid on the fact that the action was against the employer, while the negligence if any, was that of a contractor.) So in *Mangam v. Atterton*, L. R., 1 Eq. 230, where defendant had left exposed, unguarded, and in gear, in a public market place, a machine for crushing oil-cake, and a boy four years old, advised by his brother of seven, put his fingers in the gearing, while others turned the crank. In this case stress was laid on the fact that the immediate cause of the injury was the act of the others in turning the crank. On the other point *BRAMWELL, B.*, said: "The defendant is no more liable than if he had exposed goods colored with poisonous paint, and the child had sucked them." He even suggests that if the child's fingers had injured the machine he would have been liable to the owner. The decision on the ground of negligence is criticised, *obiter*, by *COCKBURN, C. J.*, in *Clark v. Chambers*, 3 Q. B. Div. 327, who says: "It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character." It may be that the *Wood* and the *Mangam* cases are distinguishable from the other cases on the ground that the machines were not apparently alluring or enticing to the small boy nature.

The intervention of the second boy, influential in the decision of the *Mangam* case, was also regarded as controlling in the *Abbott* case; but of this, *COCKBURN, C. J.*, said in the *Clark* case, that the negligence of the defendant is "not the less reprehensible because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." And in the *Lane* case, 111 Mass. 136, there was a third boy, but it seemed to make no difference.

But if the boy had been warned not to meddle with the dangerous thing in question, he meddles at his own risk. *Hughes v. Macfie*, 2 H. & C. 744, the case of the same cellar-lid as in the *Abbott* case.

So, in *Chicago & N. W. Ry. Co. v. Smith*, 46 Mich. 504, a child eight years old was in-

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jured by the sudden starting of a locomotive, on the step of which he had been standing, and from which he had just been ordered away by the fireman. He was a trespasser on the premises, had been warned against going there, and had more than ordinary intelligence. It was held that the company could not be made liable without proof that the employees knew that he was in the way at the moment, or were reckless or negligent in their management, or could have anticipated the injury.

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(36 Penn. St. 461.)

Note — non-negotiable — equities between parties.

The maker of a non-negotiable note, although it was made for the accommodation of the payee, to enable him to borrow money on it, may defeat a recovery by one to whom it has been assigned for value, by showing the want of consideration.

ASSUMPSIT on a promissory note. The opinion shows the facts. The defendant had judgment below.

Wilson & Jenks, for plaintiff in error.

Knox & Maffett, for defendant in error.

GORDON, J. [Omitting a minor point.] The remaining assignments of error may be discussed together, as they involve a single principle — the right of the maker of non-negotiable paper to defeat a recovery on it, in the hands of a third party to whom it has been assigned, for a valuable consideration, by setting up the want of consideration or any equitable condition to which it was subject when in the hands of the payee. The note in suit was the third renewal of an original, executed by the defendant to Wetter, the legal plaintiff, on the 19th of May, 1877. Admittedly it was made for the accommodation of the plaintiff, the parties at the time no doubt thinking it was negotiable, since it was intended that Wetter should have it discounted for his own purposes. Wetter at the time he received the note agreed, which indeed would follow as of course that he would, in commercial parlance, take care of this paper.

Under these circumstances the court was asked to say to the

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jury that if Kiley executed and delivered this note to Wetter for the express purpose of enabling him to negotiate and obtain money on it, the bank, to which it was passed, could recover. The court refused so to charge, and in this we think they did right. In the first place the note was not negotiable; it could pass only by assignment, and that assignment would convey to the assignee only that which the payee was entitled to receive from the maker after settlement of all accounts and equities between them. Paper of this kind falls into the same class with bonds and other specialties, of which it is said by Chief Justice SHIPPEN, in a note to the case of *Rousset v. Ins. Co.*, 1 Binn. 433, if the obligor had before the assignment, which was made under the terms of the act of the 28th of May, 1715, any just demand against the obligee, which he might have set up against him, had there been no assignment, he might in like manner set it off against the assignee, who takes the bond subject to all the equities existing between the parties before the assignment. This rule, he says, is however subject to one exception. "If the assignee, when he is about to take the assignment, calls upon the obligor to know whether the whole money is due, and the obligor tells him it is a good bond, but is entirely silent as to any claim of his against the bond, he can never afterward open his mouth against the demand of the assignee."

So in *Rider v. Johnson*, 8 Harris, 190, it was held that the assignee of a chose in action not negotiable takes it subject to all the defenses to which it was subject in the hands of the assignor, including set off of cross demands, legal or equitable. We also find it ruled in *Weaver v. Lynch*, 1 Casey, 449, that in order to estop the obligor of an assigned bond from setting up a defense, the assignee must show that he was induced to take the bond specially through the declarations of the obligor that he had no defense. Now without multiplying authorities upon points about which there ought to be no dispute, we are at a loss to see how Kiley estopped himself from setting up a defense which was certainly good against Wetter. No declarations of his to the bank officers induced them to take this paper; on the other hand, if we consult the assignment, it was taken on the guaranty of Wetter that he would pay it when due. Let it be then that Kiley gave this note to Wetter for the express purpose of enabling Wetter to raise money upon it. This was after all but a private arrangement between the parties, which was never communicated to the officers

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of the bank; they never acted upon any such understanding; how then can they set up to estop the defendant, a transaction to which their corporation was not a party, and of which they, when they took the assignment, knew nothing. Besides this the duty of inquiry rested upon them, and had they made that inquiry they would have discovered just what was found by the jury, that not only was the note drawn to Wetter in order that he might raise money on it, but that he at the same time had agreed to pay it when it fell due. Had the bank known this fact when it took the assignment, no one, we apprehend, will pretend to say that it could nevertheless hold Kiley and yet on all authority it was its duty, through inquiry of Kiley, to have known this very fact, and if it did not have this knowledge the fault was with its own officers, and no one else.

Judgment affirmed.

SHARSWOOD, C. J., and PAXSON, J., dissented.

WATTERSON V. REYNOLDS.

(95 Penn. St. 474.)

Landlord and tenant — lease — construction of.

A lease of land provided that the lessee should "hold the same, and enjoy and use all the rights and privileges of real ownership as in fee-simple," so long as he should carry on a certain iron furnace, and that he should pay the taxes, and should pay a royalty to the lessor for every ton of iron-ore dug thereon; but gave no express right to dig either iron-ore or limestone. *Held*, that he might quarry limestone on the premises for the use of the furnace.

ASSUMPSIT for the value of limestone quarried and taken away. The opinion states the case. The defendant had judgment below.

Knox & Maffett and James Campbell, for plaintiff in error.

W. L. Corbett and B. J. Reid & Son, for defendants in error.

GREEN, J. We are of the opinion that the court below gave a correct construction to the lease between Watterson and McCul-

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loch, and the judgment must therefore be affirmed. The lease is somewhat peculiar both in its character and its phraseology, but we do not think it difficult of interpretation. In terms it is a grant of a tract of land, by description containing forty-six acres, more or less, the grantee to take possession "as soon as he commences to build a furnace at the mouth of Redbank creek, and hold the same, and enjoy and use all the rights and privileges of real ownership as in fee simple so long as said McCulloch, his heirs or assigns, may carry on a furnace at the mouth of Redbank creek, in said township of Madison, except that said McCulloch is to pay the taxes on said tract of land, and to pay me twenty cents per ton for each ton of twenty-two hundred and forty pounds of ore he may dig and haul away from said tract of land." No right to dig or take away either limestone or iron-ore is given in express words. The right to take ore is assumed to exist in the remainder of the instrument, but the only language previously used which can suffice to confer that right is equally efficacious to confer also the right to take limestone. The land was manifestly leased for the very purpose of being used for the erection and maintenance of a furnace. The lessee can only take possession when he commences to build a furnace; he can hold it so long as he continues to carry on a furnace, and the same privilege is extended to his heirs and assigns indefinitely, and it is to be terminated when the property is formally abandoned as a furnace property. The consideration to be paid by the lessee, for whatever rights and privileges are conferred by the lease, is the erection and continued maintenance of a furnace on the premises, the payment of the taxes on the land, and the payment of a royalty of twenty cents per ton on every ton of twenty-two hundred and forty pounds of ore dug and hauled away from the tract. These constitute the full equivalent for every right conferred by the lease. There is no obligation to pay for any limestone that may be taken. Does the right to take limestone exist? If there are proper words giving the right it is no reply to argue against its existence that there is no provision to pay for it, since it may be paid for in the other considerations to move from the lessee.

Now the words are that the lessee is "to hold the same (that is, the tract of land), and enjoy and use all the rights and privileges of real ownership as in fee simple," so long as he may carry on a furnace on the premises. These words are in the lease for some purpose. We have no right to overlook or reject them, or to refuse

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them their plain natural meaning. It is certainly one of the "rights and privileges of real ownership as in fee simple" to take limestone from land wherever it is found. Moreover limestone is a necessary article to be used in the manufacture of pig iron, and it may well be intended that the parties who were contracting for the erection and maintenance of a furnace on the demised premises had it in contemplation that limestone, as well as iron-ore, should be taken and used in carrying on the furnace. We are of opinion that the words of the lease include the right to take limestone from the premises for use in the furnace, and as there was no obligation to pay for it other than in the manner already indicated, there could be no recovery for its value in the manner proposed in this action. The court below were right in excluding the testimony offered, and in their answers to the plaintiff's first and third points.

Judgment affirmed.

GORDON, J., dissented.

BRUNSWICK & BALKE COMPANY v. HOOVER.

(35 Penn. St. 535.)

Sale — conditional — title as to creditors of vendee.

Where goods are delivered upon lease to be paid for by installments, the title to remain in the vendor until full payment, the judgment creditors of the vendee may seize the same for their claims.

SUFFICIENTLY reported, 37 Am. Rep. 664.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

YORK COUNTY v. WATSON.

(15 S. C. 1.)

Office and officer — county treasurer — money lost by failure of bank.

A county treasurer, depositing the public funds in a savings bank of good standing, is not liable for their loss by the subsequent failure of the bank.*

ACTION against a county treasurer for accounting. The opinion states the case. The defendant had judgment below.

James F. Hart and G. W. S. Hart, for appellant.

Witherspoon & Spencer, contra.

SIMPSON, C. J. This is an appeal in a case in chancery, and it involves questions both of law and of fact.

The respondent was county treasurer of York county, from March, 1871, to March, 1877. It is alleged in the complaint that during the period he held this office he collected large sums of money for the appellant, a considerable portion of which he failed and neglected to account for and pay over to appellant.

* *Contra, Ward v. School District* (10 Neb. 303), 35 Am. Rep. 477.

This allegation seems to be true, but it appears that this default of respondent resulted from the fact that respondent had deposited this money in the Citizens' Savings Bank; that this bank has failed, and the loss which has occurred was on account of this failure of the bank.

The appellant contends that even admitting this to be true, yet as matter of law, respondent should be regarded as an insurer, liable for the whole amount collected, and that the facts set up by him constituted no legal defense.

The Circuit judge declined to enforce this stringent principle, and holding that respondent's liability was dependent upon negligence and the proper performance of his duties, he decreed, upon the facts, that the respondent was not liable for the loss incurred by reason of his deposit in the Citizens' Savings Bank.

The ground of appeal in this case involving this point brings up for the first time in this State squarely the question as to the absolute and unconditional liability of a public officer for public funds collected by him.

This is an interesting and very important question, both to the State and to all those connected with the fiscal department of the government, and it has been maturely considered by this court.

It is a well-settled principle of the common law that agents, trustees, receivers, and all those sustaining fiduciary relations to private individuals, and thereby having the custody and management of their property, such as administrators, executors, guardians and other trustees, are liable only for the exercise of good faith and proper legal diligence and care. True, the court will watch very narrowly the conduct of such trustees, and will never suffer them to escape responsibility out of mere tenderness to their misfortunes. But when it is made to appear that they have kept themselves within the rules prescribed for the discharge of their special duty, and yet a loss has occurred without any fault or negligence on their part, the court will protect them.

This principle is founded upon the highest justice and the soundest morality. It has its roots in the doctrine of *ex æquo et bono*, and it meets the approval of all just men. Where a party attends to his own business and a loss occurs, he cannot throw this loss on some one else, but he must meet and shoulder it himself. Where then he is under the necessity of procuring the assistance of another to attend to his affairs, because he is unable to do so himself, all

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that he can justly require from his agent is good faith, competency, and such diligence and care as to the matter in hand as he himself would have given it. This being bestowed, if a loss occurs it should be his loss and not that of the employee. Any other doctrine would cut up, root and branch, one of the most important departments of the business and social economy of the country — the department of bailments. This term, in its broadest sense covers all classes of agencies. These ramify into and touch every interest of society, and unless properly regulated, society would go to pieces.

It is a matter of the gravest importance therefore that whilst the rights of bailors should be most carefully guarded and protected, yet that bailees should not be hastily sacrificed.

The principles referred to above are those which prevail between private parties, and in reference to private affairs as found in the common law. They have been applied in many cases in this State. It is only necessary here to refer to the recent case of *Twitty v. Houser*, 7 S. C. 164, where an administrator depositing in this same bank was protected.

Does this common-law principle embrace public bonded officers as well as private individuals acting in a *quasi* official capacity as trustees, etc. ? It would be difficult to find a clear distinction between the two—a distinction founded upon principle, such as would justify the exclusion of the one and the inclusion of the other. If it would be wrong in principle to hold a private trustee responsible for a loss which no care of his could have prevented, would it not be equally wrong to hold a public officer responsible under like circumstances ? The liability of a bonded officer may be considered, as was said in the case of *United States v. Thomas*, in a two-fold or double aspect. First. The obligation arising from official duty, and second, that arising from the condition of his bond. The first is a duty which the law imposes, and the second is a duty which he expressly contracts to perform. The first is governed by the principles of the common law, the other by the terms and conditions of the bond ; and if a party binds himself by an express contract to perform a certain act unconditionally, at all events, he must be held by the stipulations of that contract, because such is the agreement he has made.

Now independent of the special stipulations and conditions found in the bond of a public officer, it has been held at common

law that the principles referred to above, as applicable to private individuals, apply also to public officers, so far as their obligations arising simply from official duty are concerned.

It was said in the case of *United States v. Thomas*, 15 Wall. 344 : "The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee, and the rules which grow out of that relation are held to govern the case." And in *Boyden v. United States*, where the officer was held responsible, this doctrine was not denied. On the contrary, it is said in that case : "The contract of bailment implies no more, except in the case of common carriers, than ordinary care, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He may however make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking." The defendant in that case was held liable under the terms of his bond.

Mr. Justice BRADLEY, in the case of *United States v. Thomas*, said : "The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable it must be prescribed by statute or exacted by express stipulations." Accordingly, the Congress of the United States and several of the States have made statutory regulations upon this subject, laying the foundation in the official bonds required for a more stringent responsibility than is ordinarily imposed by the common law, especially as to collectors and receivers of public moneys.

It will be found that the cases relied on by the appellant, viz., *United States v. Prescott*, 3 How. 578 ; *Same v. Dashiel*, 4 Wall. 185 ; *Same v. Keebler*, 9 id. 83 ; *Boyden v. United States*, 13 id. 17 ; *Bevans v. United States*, id. 56, decided in the Supreme Court

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of the United States, and in the case of *Muzzy v. Shattuck*, 1 Denio, 233, in New York, all turned upon the stipulations and conditions of the bonds; it being held in those cases, in accordance with established principles and many decided cases, that where a party contracts without qualification or condition to do a thing, he must perform it or make compensation in damages for non-performance, because it is nominated in the bond. But even this stringent rule was much relaxed in the Supreme Court of the United States in the recent case of *United States v. Thomas*, 15 Wall. 337, where a collector was excused even from his bond on account of overruling necessity, where it appeared he was without neglect or fault. And this rule was relaxed, although under the acts of Congress collectors are allowed all necessary additional expenses for clerks, fire-proof chests and vaults for the safe-keeping, transferring and disposing of the public moneys collected by them.

Now we have no act in this State which imposes a higher or more stringent obligation upon collectors and receivers of public money than that imposed by the common law. The form of the bond, it is true, is prescribed by statute, but the only condition is "that the duties shall be well and truly performed." This condition is the condition of the common law, arising from official duty, and is met at common law by an honest, faithful, prudent and zealous discharge of duty. Should it be thought that public policy required a more stringent rule, the general assembly, in its wisdom, could easily provide the necessary enactments to that end, but it has not done so as yet, and in the absence of such statutory regulations, the court must follow the common law applicable to such cases. We think in this case the Circuit judge followed that law in declining to hold the respondent as an insurer.

[Minor matters omitted.]

The decree below is affirmed and the appeal dismissed.

McIVER and McGOWAN, A. JJ., concurred.

HUFF V. WATKINS.

(15 S. C. 88.)

Master and servant—agricultural laborer on shares—enticing away.

An action lies for enticing away the plaintiff's agricultural laborer, employee upon an agreement for a part of the crop made, for his compensation.*

ACTION for enticing away a servant. The opinion states the case. The defendant had judgment below.

L. W. Simkins and T. S. Moorman, for appellant.

J. F. J. Caldwell, contra.

McIVER, A. J. This was an action brought by the plaintiff to recover damages from the defendant for enticing one Jordan Butler, who had been employed by the plaintiff as a farm laborer, to leave the employment of the plaintiff. The contract under which the said Butler, with the other farm laborers, had been employed, was not in writing, but is stated in the "case" as follows: "About the first of January, 1879, the plaintiff contracted with Jordan Butler and other persons to work his land during the year. The plaintiff was to furnish the land, stock and farming implements, and to feed the stock, and to have the entire control of their time and services, and they to have therefor one-half of the crop that remained, after first deducting one bale of cotton, twenty bushels of corn, and two hundred bundles of fodder to each horse; and that in consideration therefor they were to work under his exclusive direction and control from sun to sun, and do all things necessary for making and gathering a crop; also, that in consideration that Jordan Butler agreed to assist the plaintiff in securing laborers and to take the lead in the work, the plaintiff agreed to pay him one bale of cotton extra."

The Circuit judge charged the jury that under the terms of said contract the relation of master and servant did not exist between the plaintiff and Butler, and therefore the plaintiff was not entitled to recover; to which charge exception was duly taken. The plaintiff requested the judge to charge the jury that the rule of law giving a remedy for employing the servant of another after notice,

*To same effect, *Haskins v. Royster* (70 N. C. 601), 16 Am. Rep. 780.

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is not confined to menial servants, "but extends to all cases where the person is employed to give his exclusive personal service for a given time under the direction of an employer, who is injured by the wrongful act." This the judge refused to do, except with the qualification that it only extends to persons so employed for hire or wages of a definite sum. To this also exception was duly taken.

Most of the points presented in the argument here have, in our judgment, been definitely settled by the decision of this court in the case of *Daniel v. Swearengen*, 6 S. C. 297; s. c. 24 Am. Rep. 471, and we deem it unnecessary to add any thing to what is there said as to these points. In that case it was held: *First*. That the relation of master and servant exists in this State as at common law. *Second*. That to constitute such relation it is not necessary that there should be a contract in writing. *Third*. That one who contracts as a farm laborer may come within the class of servants, menial service not being essential to place one in that class. *Fourth*. That the statutes of this State do not prescribe the only mode of redress where one entices or persuades a servant to leave the employment of his master, but that in such cases, as at common law, the master is entitled to his action for damages. It did not appear however in that case whether the servants, who were there alleged to have been enticed away from their master's service, had been employed under a contract to pay them a stipulated sum of money as hire or wages, or whether, as in this case, their compensation was to be a certain proportion of the crop made. That case therefore furnishes no authority as to the main question presented by this appeal, which is, whether a farm laborer who is employed under a contract by which his services are to be compensated by a share of the crop, and not by a stipulated sum of money, can be regarded as a servant. It would seem at the very outset, that the manner in which compensation is to be made ought not to have any effect in determining the nature of the relation. Where one person has agreed to give his entire time to the service of another, working under his exclusive direction and control, certainly the manner in which payment for such service is to be made cannot have any effect in fixing the relation of the parties. That must depend upon the nature of the service required by the contract, whether it is exclusively under the direction or control of the employer, or to some extent optional or discretionary with the employee, and whether a whole or only a part of his time is to be

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devoted to the service of the employer. Here the contract required the laborers to work the land of the plaintiff "under his exclusive direction and control, from sun to sun," and gave him "the entire control of their time and services." It would be difficult to conceive what form of contract would create the relation of master and servant if this does not. If where one binds himself by contract to devote his entire time for a limited period to the service of another, and to work under the exclusive direction and control of such other person, the relation of master and servant does not arise, we confess we are unable to see what form of contract would be sufficient for the purpose. The fact that as an incentive, perhaps, to diligent and faithful work, the compensation of the laborer is not a fixed and definite sum of money, but is made to depend upon the amount of the proceeds of his labor, cannot change the relation in which the employee has voluntarily placed himself toward his employer. It certainly cannot, as has been argued, convert the relation into that of partners or joint owner of the crop. Until the crop is divided it belongs to the employer, and all that the laborer is entitled to is in the nature of a chose in action — a right to demand compensation for his labor, which, by the agreement, is to be measured by the amount of the crop made. *Rogers v. Collier*, 2 Bail. 581 (23 Am. Dec. 153); *State v. Gay*, 1 Hill (S. C.), 364; *Holcombe v. Townsend*, id. 399. The doctrine established by these cases seems to be recognized in the statute passed for the protection of laborers. Gen. Stat., ch. 103, § 11, p. 491, which provides that: "Whenever laborers are working on shares of crop or crops, or for wages in money or other valuable consideration, they shall have a prior lien upon said crop or crops in whosoever hands it may be," for if the laborer was regarded as part owner of the crop, either as partner or otherwise, it would be altogether inconsistent to speak of giving him a lien upon what belonged to him. It is true this section proceeds to provide that: "Such of the crop or crops to them [the laborers] belonging, or such amount of money or other valuable consideration due, shall be recoverable by an action in any court of competent jurisdiction." But this language, to make it consistent with the preceding language of the same section, as well as with the provisions of the preceding section, must be construed as applying only after the division of the crop has been made, and the portion to which the laborers are entitled, has been ascertained in the manner provided for in the tenth section.

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The case of *Burgess v. Carpenter*, 2 S. C. 7; s. c., 16 Am. Rep. 643, is not in conflict with these views, because, although the Circuit judge in that case did rest his decision upon the ground that a contract to pay a laborer for his services by giving him a share of the crop constitutes the laborer a partner and not a servant, the Supreme Court did not place its decision upon any such ground, but upon the ground that the common law gave no right of action to the master for an injury done to the servant, except where the servant was a menial one, and as the employee, whose *status* was there in question, was an agricultural laborer and not a menial servant, the action could not be maintained by the employer. This view, as we have seen, has been repudiated in the subsequent case of *Daniel v. Swearingen*, *supra*. It is true that MOSES, C. J., in the latter part of his opinion, where he is attempting to reconcile the case of *Daniel v. Swearingen* with the previous case of *Burgess v. Carpenter*, does say that the decision in the latter may be supported upon the ground that the nature of the contract between the employer and the employee, in that case, gave rise to the partnership relation and not to the relation of master and servant. But in addition to the fact of this being a mere *dictum*, it is very obvious that the chief justice entirely misrepresents the decision in *Burgess v. Carpenter*, in stating as the material ground of that decision, not the ground upon which the majority of the court rested its decision, but the ground upon which the Circuit judge based his conclusion, which seems to have been the ground upon which the minority of the court rested the separate opinion. For it is quite clear that the Circuit judge, in *Burgess v. Carpenter*, based his conclusion solely upon the ground "that the contract to pay Henry Burgess a share in the crop made him a copartner and not a servant," and if the majority of the Supreme Court indorsed that view, it would have been very natural for them to have said so, as that would have been conclusive of the case. But on the contrary we find nothing of the kind in the opinion of the majority of the court, but we do find there an argument to show that the master's right of action only arose where the servant injured was a menial servant, and the conclusion is drawn that "Henry Burgess being exclusively concerned in the cultivation of the soil and proceeds arising therefrom, and there being no domestic caste in the nature of his service (which seems to have been regarded in the cases cited as a test of menial service), he does not fall

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within the class to which the term 'servant' can in any sense be applied." We do not think that this *dictum* in the case of *Daniel v. Swearingen*, even were it better supported, is sufficient to overthrow the authority of the cases of *Rogers v. Collier*, *State v. Gay*, and *Holcombe v. Townsend*, *supra*, especially when we find that the principle established by those cases has been recognized, impliedly at least, by the legislature in the statute for the protection of laborers, as we have previously shown. We think therefore that there was error in the charge to the jury in this case as well as in the refusal to charge as requested.

[Point of practice omitted.]

The judgment of the Circuit Court is set aside, and a new trial is ordered.

So ordered.

SIMPSON, O. J., and MCGOWAN, J., concurred.

HELLAMS V. ABERCROMBIE.

(15 S. C. 110.)

Sunday — mortgage on — surety — foreclosing collateral mortgage before payment — bar.

A mortgage executed on Sunday is not void either at common law or under a statutory prohibition of the exercise on that day of acts in the "ordinary calling" of the citizen.*

A surety secured by a collateral mortgage may foreclose it before paying the debt to the principal, and for the whole amount of his liability, although the creditor has obtained judgment for less.

FORECLOSURE. The opinion states the case. The plaintiff had judgment below.

A. Blythe, for appellant.

J. H. Whitner, contra.

SIMPSON, O. J. This was an action brought by the respondent's intestate, in his life-time, to foreclose a mortgage given by the ap-

* *Contra*, *Parker v. Pitts* (73 Ind. 597, 35 Am. Rep. 155).

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pellant to the said intestate to indemnify and save him harmless from all loss or damage by reason of his suretyship on a note of said appellant to one John Woods.

The appellant, by his answer, admitted the execution of the note and mortgage, but insisted that inasmuch as the creditor, Woods, had sued him on said note and recovered judgment against him in said suit for the sum of \$165.33, which his property was amply sufficient to pay, the condition of his mortgage had never been broken, and the respondent's intestate therefore could not maintain this action; but even if he could maintain the action he was only entitled to a judgment of foreclosure for the amount recovered by the creditor, Woods, against him as principal debtor; that the said mortgage was executed on Sunday, and was therefore illegal and void.

His honor, T. B. FRASER, who heard the case, adjudged and decreed that the respondent, as the personal representative of the surety, John Hellams, was entitled to have judgment of foreclosure for whatever amount might then be due upon the note to Woods, and ordered a reference to ascertain that amount. The defendant, Elihu W. Abercrombie, appealed from that decision.

Three questions are presented in the appeal in this case:

1. Is a mortgage executed on a Sunday illegal and void on that account?
2. Can a surety who holds a mortgage of indemnity on the principal enforce it before he pays the debt for which he is surety?
3. If so, can the surety recover from the principal a greater sum than the creditor has reduced to judgment against the principal?

Whatever may be our opinion as to the moral or religious aspects of the first question above, yet this case cannot be decided upon considerations of that character. The question is strictly a legal question and must be determined upon legal principles. As was said in the case of *State v. Ricketts*, 74 N. C. 187, "what religion and morality permit or forbid to be done on Sunday is not within our province to decide. In different Christian countries and in different ages in the same country very differing opinions have prevailed upon these questions." So that in all matters of this kind, when the judgment of a civil court is invoked in reference to a special act, the only question to be considered is, is the act obnoxious to any established principle of the common or statute law?

A contract may be briefly defined to be an agreement between

two or more parties to do or not to do some act founded upon a sufficient legal consideration. The two principal elements are—*first*, the act to be done; and *second*, the consideration. If these be both legal, then the contract is binding, unless there is something external to the contract itself which forbids enforcement.

The contract in this case is an ordinary contract between principal and surety, by which the principal undertook to indemnify and save harmless the surety, as to the debt of the principal, in consideration of obtaining the credit and name of the surety in contracting the debt. The benefit of this credit of the surety the principal has enjoyed for near twenty years, and he now seeks to repudiate his contract, founded upon this as a consideration, on the ground that it was obtained originally on a Sunday. Even if the law allowed him to avoid his responsibility on the ground suggested, the same high morality which prompts him to invoke the law should also prompt him to save his friend harmless. But to return to the question. Is there any thing external to this contract which renders it void? In other words, is a contract of this character illegal, either by the common or statute law, because made on a Sunday?

The argument of the respondent's attorney has gone very fully and learnedly into this question. The case of *Swann v. Broome*, 3 Burr. 1595, referred to by him, seems to be the leading case on the subject. In that case it was held by Lord Mansfield that at common law a Sunday was not *dies juridicus*; that at first, among the ancient Christians, all days were used alike for hearing causes in the courts, "not sparing, as it seemeth, the Sunday itself;" but afterward certain canons, reaching back to the year 517, were made, taken notice of in Spellman's Original of the Terms, which forbid the use of Sunday for hearing causes or holding pleas. These canons were confirmed, says Lord Mansfield, by William the Conqueror and Henry II., and so became a part of the common law of England. This inhibition of the common law did not however extend to fairs, markets, sports and pastimes; these were left to be regulated by statutes.

How far the common law, as thus recognized and announced by Lord Mansfield, has been observed in this State, is not material to this case, as the question here is not one involving the powers of the court on a Sunday, but one involving the validity of a contract made on a Sunday.

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Parties who may be curious as to the powers of the court in this respect will find the law in the cases of *Shaw v. McCormick* and *Hiller v. English*, the first in 2 Bay, 232, and the second in 4 Strobh. 488, in the last of which Judge WARDLAW delivered a very interesting and learned opinion, Judge O'NEALL dissenting in a masterly argument from the opinion of the majority of the court, thus pronounced by Judge WARDLAW. It is true that in the case of *Shaw v. McCormick* this expression is used: "That Sunday is not a day in law — *dies dominicus non est dies juridicus* — consequently all temporal business transacted on that day is null and void." Upon examination of the facts of that case it will be seen that the reporter was not warranted in supposing that the decision reached the conclusion announced in the above extract; on the contrary this was an inference of his own, not sustained by the facts.

Under these cases then it appears there is nothing in the common law which renders this contract void. In 2 Pars. on Cont. 757, it is said: "But as to the making of contracts, and all other acts not judicial, the common law made no distinction between Sunday and any other day."

Is the contract void by virtue of any statute of the State? The act of 1712 is the only act on the subject. That act forbids tradesmen, workmen, laborers, etc., from exercising any worldly labor, business, or work in their ordinary calling upon the Lord's day under a certain penalty.

The execution of the mortgage now under consideration does not fall within the penalty of this act, and therefore void. It was not an act done within the ordinary calling of the parties. It was a casual and exceptional act, and in no way violated the act of 1712.

The first section of 29 Charles II, was very similar in its terms to the act of 1712. This section was construed in the cases of *Drury v. De Fontaine*, 1 Taunt. 131, and in *Bloxsome v. Williams*, 3 B. & C. 232, not to embrace contracts made outside of the ordinary calling of the party. True, in one case decided since, a different doctrine was held, the construction above being regarded as too narrow and contrary to the spirit of the act; but in the subsequent decisions, especially in the case of *Rex v. Inhabitants of Whitnash*, 7 B. & C. 596, the decision in the case of *Bloxsome v. Williams*, *supra*, was re-affirmed, and a contract of hiring between a farmer and a laborer for a year, made on a Sunday, was held valid. Such, in our opinion, is the proper construction of the act of 1712, incorporated in the General Statutes, page 390.

2. Can a surety sue the principal before he pays the debt of his principal?

It has been settled as a principle of equity that upon the falling due of the debt a surety is entitled to go into equity and compel payment by the principal, to his relief. Although the surety may not be sued, nor as yet has been disturbed, yet as long as the debt of his principal remains unpaid there is a cloud hanging over him, and this he is entitled, in equity, to have cleared away; which right courts of equity have always enforced—in the application of remedial justice—by proceedings in the nature of bills *quia timet*.

In the case of *Norton v. Reid*, found at the end of 11 S. C., this doctrine was fully recognized and applied, and it may be regarded as sufficiently settled in this State, without reference to other authority. But this does not touch the question under discussion, *i. e.*, as to the right of a surety to sue and recover from the principal the amount of the debt for which he is liable as such surety before he has actually paid the debt himself.

The two questions stand upon different foundations and are governed by different principles. In the one case the object is to enforce payment by the principal of a debt which he contracted to pay. In the other it is to require the principal to pay the surety before any liability attached, and before any cause of action has accrued to the surety. No action can be had until a cause of action has accrued, and the only cause that can ordinarily exist between a principal and his surety, growing out of the suretyship, is payment of the debt by the surety. Until this is done the surety has no basis upon which to stand in court and demand payment to himself. Until this is done his remedy is in equity, as in the case of *Norton v. Reid*, *supra*.

In Decolyar on Principal and Surety, page 308, it is said: "The most important right which a surety possesses before any payment by him is, that after the debt has become due he may come into a court of equity and compel the debtor to exonerate him from his liability by at once paying the debt." "At law the surety must pay the debt before he can have an action against his principal, but not so in equity. After the debt is due the surety may resort to chancery to compel the principal to exonerate him and pay the debt." Story's Eq. 322, § 327; 2 *id.* 35, § 730; *King v. Baldwin*, 2 Johns. Ch. 554 (8 Am. Dec. 415). "As a general rule, as soon as the surety has paid any thing for the principal debtor the latter becomes chargeable to him." Decolyar, 311.

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Though, as just stated, the surety must have first paid something for the principal in order to make the latter chargeable to him, yet it appears "that by express contract the surety may, before payment, be entitled to recover damages." *Id.* 312. And while it is the general rule that a surety cannot proceed against his principal until he has paid the debt, either in money or by taking it up through the substitution of his own note, as established in many cases (*Elwood v. Deifendorf*, 5 Barb. 398; *Brandt on Suretyship*, 235; *Stinson v. Brennan*, Chev. 16; *Peters v. Barnhill*, 1 Hill [S. C.], 234), yet it has been held, where the cause of action between them arises out of a bond of indemnity or other collateral security, involving an independent contract, that action may be instituted on that, on its breach, even before payment.

In this case the action is to foreclose a mortgage. The mortgage is not set out in the record; but it is stated to be a mortgage of indemnity, and to save harmless.

In the case of *Bethune v. Wallace*, 2 Rich. 80, where a mortgage had been given of a slave by a principal to his surety to indemnify and save him harmless, it was adjudged by the court that a failure to meet the obligation by the principal was such a breach of the condition of the mortgage as authorized the surety to sue for the slave at once without payment of the debt. Also in *Brandt*, section 193, it is said: "A surety or guarantor who holds a mortgage on the property of the principal, may, after maturity of the debt and before paying it, have the mortgage foreclosed, and the proceeds thereof applied to the payment of the debt."

Under this principle this action may be sustained and the judgment below affirmed, in so far as the right of action on the part of the plaintiff is involved before payment of the debt.

The next and last question is as to the amount to be recovered. The judgment of the creditor against the principal is less than the notes sued on. Why this was so is not explained; but there was no appeal from this judgment, and it is the measure of the debt established against the principal. Can the surety foreclose his mortgage for more?

In the case of *United States v. Allsbury*, 4 Wall. 186, suit was commenced against the principal and one surety on a paymaster's official bond, and judgment for \$10,000 recovered. Afterward suit was brought against another surety on the bond, claiming a greater recovery. The court held, as the liability of the principal had

been fixed at \$10,000 by the first judgment, the surety in the last suit could not be held liable for more, otherwise the surety would be held for a greater liability than his principal.

And in the case of *Lang v. Brevard*, 3 Strobb. Eq. 64, Chancellor DARGAN said that "the prominent and well-defined distinction that pervades all the cases is that the surety will be discharged by any acts on the part of the creditor of a positive character, whereby the remedy against the principal debtor is lost, so that payment cannot be enforced against him. The case now under consideration would seem at first to fall under the principle of these cases, and but for *contra* decisions in our own State, which we must regard as authority, I would be disposed to determine this question by that principle."

But in the case of *Treasurer v. Bates*, 2 Bail. 362, and in other cases in this State, it was decided that a judgment against a principal could not be pleaded in bar to a suit against the surety. And in *Day v. Hill*, 2 Spears, 628, in an action on a joint and several note, where one of the parties had been previously sued, and by some mistake judgment rendered for a less amount than was due, the balance was recovered from the other parties. *Peters v. Barnhill* and *Stinson v. Brennan*, *supra*, were cases where the sureties were held liable, though the creditor had failed to recover judgment against the principals on suit brought against them, and the sureties were allowed to recover against the principals.

These cases were adjudicated in our own courts, and they are so nearly in point that we cannot but yield to their authority.

The judgment below is affirmed, and the appeal dismissed.

Judgment affirmed.

McIVER and McGOWAN, A. JJ., concurred.

CITY OF CHARLESTON V. BLOHME.

(15 S. C. 124.)

Sale -- judicial -- caveat exemptor.

One purchased land on a foreclosure sale, relying on a recorded satisfaction of a prior mortgage. Learning that the satisfaction was forged, she refused to complete. *Held*, that she should not be compelled to comply, unless the validity of the title should first be legally and judicially established.*

* See *Neal v. Gillespy* (36 Ind. 451), 28 Am. Rep. 87, and note, 28; *Roberts v. Hughes* (31 Ill. 130), 26 Am. Rep. 270.

City of Charleston v. Blohme.

PROCEEDINGS to compel performance of purchase at a foreclosure sale. The opinion states the case. The defendant had judgment below.

G. D. Bryan, for appellant.

J. Ancrum Simons, contra.

McIVER, A. J. Under proper proceedings to foreclose a mortgage, a certain house and lot in the city of Charleston was offered for sale by the master, and bid off by the respondent. She declined to comply with the terms of sale, and a rule was issued requiring her to show cause why she should not be required to comply. In the return to the rule the respondent stated that after she had bid off the property she was informed that a prior mortgage on the property, upon the record of which there was an indorsement of satisfaction, had not in fact been satisfied, and was still a lien upon the property; the allegation being that the entry of satisfaction on the record, though purporting to be signed by the mortgagee, was a forgery. This return was supported by an affidavit of the person whose signature to the indorsement of satisfaction was alleged to have been forged.

The Circuit judge discharged the rule, and ordered that respondent "be discharged from her said purchase, unless proceedings be instituted, with proper parties, to test the validity of the title."

From this decision the plaintiff appeals, upon the ground "that the rule of *caveat emptor* applies to judicial sales under foreclosure of mortgages."

While it is true that there is no warranty at a judicial sale (*Commissioner v. Thompson*, 4 McC. 434; *Mitchell v. Pinckney*, 13 S. C. 203), it is equally true that at such sales the rule of *caveat emptor* does not apply (*Tunno v. Fludd*, 1 McC. 121; *Commissioner v. Smith*, 9 Rich. 515; *Bolivar v. Ziegler*, 9 S. C. 287), at least not to the extent which it does at sales under execution. At a sale under execution the sheriff only sells the interest of the defendant in execution, whether it be much or little, or whether it be any thing at all, but at a judicial sale the court orders, and the officer sells the property, which is the subject matter of the suit; and the interests of all parties to the action, but none others, are concluded by such sale. Hence under an action for foreclosure of a mortgage

of real estate, which is covered by prior or by subsequent mortgages, the holders of which are not made parties, the property which is the subject matter of the suit — the thing sold — is in the one case the equity of redemption, and in the other is the mortgaged property, subject to the right of the subsequent incumbrancers to redeem. If therefore these incumbrancers are not made parties, the purchaser at such sale takes the property subject to the lien of the prior mortgage, or subject to the right of the junior mortgagees to redeem, provided he has notice, either actual or constructive, of such incumbrances.

Still while there is no warranty at a judicial sale, yet if when the purchaser is sued for the purchase-money he can show that at the sale there were misrepresentations as to the thing sold, whether willful or not, he may set up such misrepresentations as a defense to the action. *State v. Gaillard*, 2 Bay, 11; *Means v. Brickell*, 2 Hill (S. C.), 657; *Adams v. Kibler*, 7 S. C. 58; *Mitchell v. Pinckney*, 13 id. 203.

The real question however in this case is not whether the purchaser at a judicial sale can set up defects in the title, or incumbrances upon the thing sold, as a defense to an action for the purchase-money, but whether one who has bid off property at such a sale will be compelled by the court to complete the contract of sale, and accept a title to property incumbered by a prior mortgage, when the records showed at the time of the sale that such incumbrance had been removed.

Even in Rorer on Judicial Sales, where the rule of *caveat emptor* is applied to such sales much more vigorously than in this State, it is said in section 150 that a purchaser at a judicial sale cannot be compelled to complete the sale if the title be defective, and the defect be discovered before the sale is consummated, "and therefore if a rule be made against him with a view to enforcing compliance with his bid, he may, on appearance thereto, have an order of reference to inquire into and report the state of the title to the property, and if the title prove to be doubtful and incurably defective he will not be coerced into completion of the purchase." So in 2 Jones on Mort., § 1645, it is said: "If there be a defect in the title, unknown to the purchaser at the time of the sale, the court will not ordinarily compel him to take a deed and complete the purchase." Again in section 1648 this author says: "While the purchaser under a judicial sale submits himself to the jurisdiction

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of the court, and may be compelled to carry out his contract, he is also entitled to the protection of the court in respect to the avoidance of the purchase, if by reason of imperfection in the title or otherwise he is freed from his agreement. He may apply for a reference to inquire into the title. * * * If the report be against the title the purchaser may move to be discharged, and for a return of his deposit and for costs." And again in section 1651: "Judicial sales must be conducted with the utmost fairness, and * * * it will be set aside where the purchaser thought he was buying an absolute title to the land, and not one subject to the first mortgage." If however the purchaser, at the time of the sale, knows of the defects in the title, or has the means of knowing of them, and fails to avail himself of such means, he cannot afterward refuse to comply upon the ground of such defects. 2 Jones on Mort., § 1646.

Applying these principles to the case under consideration we think it clear that the Circuit judge was not in error in discharging the rule. The purchaser had a right to suppose from an examination of the records, and the respondent says under oath that she did suppose that the property was free from any incumbrance, and if afterward it was made to appear that a prior mortgage, which appeared upon the records to be satisfied, was not in fact satisfied, it is manifest that the purchaser was misled by a resort to the very source of information to which the law invited her to look, and made her bid under a misapprehension induced by the misrepresentations spread upon the record. In such a case there is no ground upon which the powers of a court of equity could be invoked to compel her to complete the purchase, but on the contrary it would be altogether inequitable to require her to do so.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

SIMPSON, C. J., and MCGOWAN, A. J., concurred.

 Ex parte Duckett.

EX PARTE DUCKETT.

(15 S. C. 330.)

Criminal law—sentence—expiation—statutory construction.

A convict was sentenced to imprisonment in the penitentiary at hard labor "for the term of two years from this date, February 27, 1879." He appealed, and was not transferred to the penitentiary until July 31, 1879. *Held*, that his imprisonment in the penitentiary should date from the latter day.*

HABEAS CORPUS. The opinion states the case.

R. C. Watts, for petitioners.

Youmans, attorney-general, *contra*.

MCGOWAN, A. J. This was a petition for writ of *habeas corpus*, representing that the petitioners were illegally imprisoned and restrained of their liberty by Thomas J. Lipscomb, superintendent of the State penitentiary, heard by the chief justice, and reserved for the determination of the full court on the facts, agreed substantially as follows :

The petitioners, Henry Duckett and Griffin Duckett, were convicted of grand larceny in the Court of General Sessions for Laurens county, in February, 1879, and Judge ALDRICH pronounced the following sentence : "The sentence of the court is that you, Henry Duckett, and you Griffin Duckett, be each imprisoned in the State penitentiary, at hard labor, for the term of two years from this date, February 27, 1879."

The petitioners appealed to the Supreme Court, which appeal was pending until July 28, 1879, when this court dismissed the appeal and affirmed the judgment of the Circuit Court. The petitioners were in jail at Laurens at the time of their trial, and pending the appeal remained there. After the appeal was dismissed, July 31, 1879, the sheriff of Laurens county delivered said petitioners to Thomas J. Lipscomb, Esq., superintendent of the State penitentiary, who afterward, to wit : on October 1, 1879, under an order of the board of directors of the penitentiary, hired them out to work

* See *Sartain v. State* (10 Tex. Ct. App. 651), 38 Am. Rep. 619, and note, 652.

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on the Air-Line Railroad. The petitioners now claim their discharge on the following ground :

1. That their term of sentence expired on February 27, 1881, two years from the date of their sentence, February 27, 1879.

2. That they were sentenced to two years' hard labor "in the penitentiary," and in hiring them out, the directors transcended their powers.

As to the first ground for discharge. The petitioners were delivered to the superintendent of the penitentiary, July 31, 1879, under the sentence that they should be "each imprisoned in the State penitentiary at hard labor, for the term of two years." Two years from the time they reached the penitentiary will not have expired until July 31, 1881, so that it is clear that the petitioners have not served out the time in the State penitentiary to which they were sentenced.

But in framing the sentence these words were added : "From this date, February 27, 1879," and it is urged that this being a matter touching the liberty of the citizen, the sentence should be construed literally, and that the two years' imprisonment in the penitentiary must be considered to have commenced at the date of the sentence, February 27th, although the parties were not actually lodged in the penitentiary until July 31, 1879.

The judgment, though pronounced by the judge, is not his determination, but that of the law, which depends not upon the arbitrary opinion of the judge, but the settled and irreversible principles of justice. The substance of the sentence was that the petitioners should be "imprisoned in the State penitentiary at hard labor, for the term of two years," and the date of the sentence, as also the time when it was directed to be carried into effect, was not of the essence of the sentence, but merely directory. Mr. Bishop lays down the law as follows : "Though the sentence to imprisonment ought properly to specify at what time it is to be carried out, yet time is not of the essence of such a sentence. Therefore a defendant, who had been convicted of an assault, was sentenced to imprisonment for two calendar months, 'from and after the 1st day of November next,' but did not go into prison according to the sentence, and at a subsequent term it was decided that the sentence for two months' imprisonment be immediately executed ; the proceeding was held to be correct." 1 Bishop on Cr. Proc., § 878 ; *Kelly v. State*, 3 Smedes & M. 518 ; *State v.*

Ex parte Duckett.

Cockerham, 2 Ired. 204. In the case last cited, Judge GASTON, with great clearness, said : " The time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law as declared by the court, while the direction with respect to carrying it into effect is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two calendar months, and the words which follow in the record, ' from and after the 1st of November next,' direct the time of executing the judgment. The entry indeed would have been more formal, had the judgment and the mandate for carrying it into effect been separate and distinct. But however informal, it can be understood in conformity to the law as consisting of distinct parts, and therefore ought to be so understood."

So, in this case, the sentence was that the petitioners should be " imprisoned in the penitentiary at hard labor, for the term of two years," while the direction with respect to carrying it into effect is in the nature of a mandate of execution.

This doctrine applies most appropriately to the case at bar. The absence of these parties from the penitentiary after sentence and before July 31, 1879, was the result of their own act. They cannot say that they were undergoing part of their sentence during that time. They had the right to appeal, and the delay of five months was caused by their exercising their right of appeal to this court for the purpose of arresting the judgment, which had to be pronounced before their appeal could be heard. *State v. Rankin*, 3 S. C. 438. During the time the appeal was being prosecuted the sentence was practically suspended, for it was proper not to enforce it pending appeal, the result of which might have been to reverse the judgment. The time spent in jail at Laurens after sentence cannot be considered as in part execution of the sentence to " imprisonment in the penitentiary." It would have been false imprisonment to have detained them there under that sentence. They were there when they were convicted, and simply remained there awaiting the final determination of their trial, which was not ended until their appeal was dismissed. They did not commence to carry out the sentence until that time, July 28, 1879, when for the first time it was proper to enforce the sentence. The delay was as much their own act as if they had escaped confinement during the intermediate time. In *Dolan's case*, 101 Mass. 222, the prisoner asked

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his discharge, although the period of his actual confinement had been less than that for which he was sentenced, by reason of his escape for nearly a year during the term. The court say: "We are of the opinion that the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. The punishment is imprisonment, the period of which is expressed only by the designated length of time. * * * Expiration of time without imprisonment is in no sense an execution of sentence." We do not think the petitioners have served out "in the penitentiary" their full sentence of two years.

[Omitting the second point.]

The motion for the discharge of the petitioners is refused, and they are remanded to the custody of the superintendent of the penitentiary.

SIMPSON, C. J., and McIVER, A. J., concurred.

STATE V. COLLINS.

(15 S. C. 373.)

Evidence — memorandum.

Employees in a hospital testified, in a capital case, to certain matters as within their recollection, refreshed by referring to the contemporaneous records of the hospital. The records were not produced in court, and the entries were not made by any of the witnesses. *Held*, no error.*

CONVICTION of murder. The opinion states the case.

S. J. Lee, for appellant.

Solicitor Jervey, contra.

McIVER, A. J. This was an indictment for murder, in which the appellant was charged with having inflicted a mortal wound on one Peter Broughton on June 7, 1880, from which death ensued on July 20 following. The wound was inflicted near a country

* See note, 35 Am. Rep. 55; 30 Id. 437, 438.

store in the county of Charleston, and the deceased was removed, a few days afterward, to the city hospital in Charleston, where, it was alleged, he died from the effects of the wound on the day above mentioned. All the testimony taken at the trial is set out in the "case," but we propose to refer to only so much of it as will be necessary for a proper understanding of the grounds of appeal. The appellant having been convicted, moved for a new trial on the ground set forth in his notice of appeal, and upon the refusal of this motion, gave due notice of appeal upon the following grounds:

"1. Because the court erred in admitting the testimony of T. E. Newton, a witness for the State, about matters of which he had no knowledge, except by means of refreshing his memory from the records of the city hospital, which said records were not produced in court, and no opportunity afforded defendant's counsel to examine them.

"2. Because the court erred in admitting the testimony of Dr. King, a witness for the State, to facts of which he had no knowledge, except that which appeared in the records of the city hospital, which records were not proved to be in the said witness' handwriting, and said records were not produced in court, and no opportunity afforded defendant's counsel to examine them.

"3. Because the court erred in admitting as evidence the declarations of Peter Broughton, the alleged deceased, made to Friday Watson, a witness for the State, on the day after the altercation when said Peter Broughton was not in a dying condition, and said declarations were not made in the presence of the defendant."

The fourth ground of appeal having been very properly abandoned, need not be set out here.

The questions raised by the first and second grounds of appeal involve the consideration of the rule as to a witness being allowed to refresh his memory by reference to written documents. In this respect the rules of evidence are the same in criminal as in civil cases. *State v. Rawls*, 2 N. & McC. 331. The rule is thus stated in 1 Stark. on Ev. 128: "If a witness has made a memorandum of facts, he may refresh his memory by referring to it; and if by that means he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is evidence; but if he has no knowledge or recollection of the fact except that he perused it in a book or paper, the original book or paper must be produced, and he cannot give evidence of the facts. It is not essential that the

memorandum should have been contemporary with the fact. It seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory."

In 2 Russ. on Crimes, 622, the rule is laid down as follows: "A witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the fact to which it relates; but if he cannot speak to the fact from recollection any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing."

In 1 Greenl. Ev., § 436, in speaking of the rule upon this subject, it is said that a witness "is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection." And again, in section 437, this author divides the cases in which writings may be referred to by witnesses to refresh or assist their memories into three classes: "*First.* Where the writing is used only for the purpose of assisting the memory of the witness. In this case it does not seem necessary that the writing should be produced in court, though its absence may afford matter of observation to the jury, for the witness at last testifies from his own recollection. *Second.* Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers, that at the time he saw it, he knew the contents to be correct. In this case the writing itself must be produced in court in order that the other party may cross-examine. * * * *Third.* Where the writing in question neither is recognized by the witness, as one which he remembers to have before seen, nor awakens his memory to the recollection of any thing contained in it, but nevertheless knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively to the fact," one of the illustrations given being where a witness called to prove the execution of a deed is unable to recall any recollection whatever of the fact, and yet from the fact of seeing his genuine

signature as an attesting witness, he is permitted to prove the execution of the deed. In section 438 it is said that no precise rule has been established as to the time when the writing thus resorted to should be made, but that it ought at least to have been made before such a period of time has elapsed as to render it probable that the memory of the witness might have become deficient. The cases upon the subject from our own State, which have been referred to in the argument, will next be considered.

In *State v. Rawls*, *supra*, the rule was laid down in the following language: "Where a person who was a witness to a particular transaction had made a memorandum at the time of certain facts for the purpose of perpetuating the memory of them, and could at any subsequent period swear that he made the entry at the time for that purpose, and that he knew from that memorandum that the facts did exist, it would be good evidence, although he might not retain a distinct recollection of the facts themselves." In this case it does not distinctly appear that the memorandum was produced in court, though it is a fair inference from what is stated that it was read from by the witness while on the stand. In *O'Neale v. Walton*, 1 Rich. 234, an unsuccessful effort was made to extend the rule thus laid down so as to permit a memorandum made two weeks after the occurrence to which it related, not by the witnesses themselves, though signed by them, but by an interested party, to be read in evidence. No objection was made in the use of the paper merely for the purpose of refreshing the memory of the witness, but when they stated, that independently of the paper itself they had no distinct recollection of the facts which it contained, objection was made and sustained by the Court of Appeals, principally, as it seems, upon the ground that the paper in question was prepared by one of the parties in interest, and not by the witnesses themselves; and also that it was prepared as long as two weeks after the occurrence which it purported to record. It is a mistake to say, as was urged in the argument here, that this case practically overruled the case of *State v. Rawls*. On the contrary, the authority of that case is distinctly recognized, and the court only says that the principle there laid down is not to be extended so as to cover a case like that of *O'Neale v. Walton*, where the memorandum relied upon is not made by the witness, but by an interested party weeks after the event.

In *Ballard v. Ballard*, 5 Rich. 495, a witness was offered to prove

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a demand and refusal in an action of trover, and being unable to say what reply the defendant made when the demand was made, without reading from a written memorandum, which, he said, "he believed stated the truth—he at first thought it was made on the day of the demand—but after he went home he afterward said he did not think it was made on that day, but that it was made on the next day, or not long after," the plaintiff offered the memorandum in evidence, but it was not admitted. One of the questions before the Court of Appeals was as to the propriety of excluding this memorandum. The court, while recognizing the rule as laid down in *State v. Rawls*, and approving the declaration made in *O'Neale v. Walton*, that this rule should not be extended as there proposed, held that the memorandum was properly excluded, and seemed to lay stress upon the fact that the memorandum "was not prepared at least until the next day, if then, after a conference." It will be observed that there was no question raised in this case as to whether the witness could, after refreshing his memory by reference to the memorandum, testify to the facts therein contained, but the question was, whether the memorandum itself could be used as evidence.

In *Berry v. Jourdan*, 11 Rich. 67, the rule is recognized that a witness may be allowed to refresh and assist his memory by referring to a written instrument, memorandum or entry in a book, even though such writing may not have been made by himself, provided that after reading it he can speak to the facts from his own recollection.

The case of *Furman v. Peay*, 2 Bail. 394, cited by appellant's counsel to show the necessity for producing in court the hospital records, was a case in which an attempt was made to prove an account for goods sold by book entries, and not a case in which a written memorandum was resorted to for the purpose of refreshing the memory of a witness, and does not therefore apply to this case. *State v. Cardoza*, 11 S. C. 239. In such a case the entries themselves constitute the evidence of the sale and delivery of the goods, and hence the necessity for the production in court of the books containing such entries. And see too the recent case of *Bank v. Zorn*, 14 S. C. 444.

Applying the principles deducible from the foregoing authorities to the case in hand, we do not see how the first and second grounds of appeal can be sustained. It appears that the hospital records were only resorted to by the witnesses for the purpose of refreshing

their memories as to certain details, dates, etc., and there was no offer or attempt to use these records as testimony, and there was no necessity for the production in court of these records. Where a memorandum or other writing is referred to by a witness simply to refresh his memory, and it is not proposed to use such memorandum or writing as testimony, but to rely entirely upon the recollection of the witness as refreshed by such memorandum or writing, there can be no necessity for producing the same in court, for it may be, as in the case of *State v. Cardoza, supra*, that the writing resorted to for that purpose is of such a character as to be altogether unintelligible to any one but the witness himself; and yet upon the principle of the association of ideas, it may be quite sufficient to restore the recollection of a fact which had faded from the memory of the witness.

Nor do we think there is any foundation for the objection that the records used to refresh the memories of these witnesses were not made by them. As matter of fact, it seems that one of the books referred to—the general register—was kept by the witness Newton, while the other book—the surgical register—was kept by the other witness, Dr. King, and in both of the books the entries were made contemporaneously with the occurrence of the facts recorded, or at least so near the time of the occurrence of such facts as to render them practically contemporaneous. These books, as their names import, seem to contain the daily record of what occurred in the hospital, and we see no error in allowing the officers of the hospital, whose duty it was to keep these records, to refer to them for the purpose of refreshing their memories as to the facts there recorded.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., and MCGOWAN, A. J., concurred.

Moore v. Sanders.

MOORE v. SANDERS.

(15 S. C. 440.)

Will—devise—subsequent limitation.

A testator devised his whole estate to M. in fee simple absolute. By a subsequent clause he provided that if M. should die intestate, the whole estate should go in a different line. *Held*, that M. took absolutely the limitation over, dependent on a condition subsequent, being void.

THE opinion states the case.

Jos. H. Earle, for appellant.

Blanding & Blanding, contra.

SIMPSON, C. J. This is a case submitted without action under section 389, of the Code. It appears that Matthew S. Moore, the respondent, bargained to sell and convey, in fee simple, a certain tract of land to George M. Sanders, the appellant, for \$3,500. Moore offered and is still ready to execute titles, but Sanders declines to accept his deed, alleging that Moore cannot convey in fee. Moore's title is derived from the will of his mother, Mrs. Sarah J. C. Elliott, deceased. So much of this will as it is necessary to consider, is in the following language: "I give and bequeath my whole estate, both real and personal, all that I now possess or may hereafter become possessed of, to my beloved son, Matthew S. Moore. Learning that the law takes cognizance of the intention, even when illegally expressed, I desire to express my wish as strongly and emphatically as I can do so by will, that my beloved son, Matthew S. Moore, shall inherit, possess and own, in fee simple, all my worldly goods, to dispose of as he may think fit. But should he die without leaving a will, then the whole to go to my grandchildren, share and share alike. The child or children of any grandchildren who may die before such division taking the share which the parent would have been entitled to had said parent lived to the period of said distribution or division."

Upon the hearing below Judge THOMSON decreed that the estate devised to Moore is a fee and that he is able to make good and sufficient titles to Sanders. Sanders excepted to this decree. His

appeal brings up the single question : " Did Moore take under the will of Mrs. Elliott a fee indefeasible in the land in question ?

It will be seen on reading the will that Mrs. Elliott, in the beginning of the clause above, bequeathed and devised to her son, the respondent, her entire personal property, and also a fee in all of her real estate ; and if there was no other provision in her will, no difficulty whatever could have arisen as to its construction. She however with the view, as she thought, more distinctly to declare her intention, went further, and as is not uncommon in such cases, instead of more clearly expressing her purpose, said just enough to create doubt and to demand the assistance of the courts to ascertain and declare what she really did mean. After giving her whole estate to her son, in the first part of the clause above quoted, in the latter she directed that if her son should die without leaving a will, then the whole should go to her grandchildren, share and share alike. It is here that the ambiguity arises. It is contended that this portion of the clause attached a condition to the estate previously given, which, if not complied with by Moore, will forfeit the estate, and therefore that he is not able to convey a perfect title, absolute and indefeasible.

Conditions are of two kinds — conditions precedent and conditions subsequent. A condition precedent is a condition upon the happening of which an estate will vest. A condition subsequent defeats an estate already vested. It is contended that this is a condition subsequent.

It is a general rule as to conditions subsequent, that to be valid they must not be repugnant to the estate given or devised. They must not be an exception to the very thing, that is, to the substance of the gift ; if so, they are void, and the estate granted will stand unaffected by such conditions. Thus, in *Blackstone Bank v. Davis*, 21 Pick. 42, it was held that " a condition in a grant or devise that the grantee shall not alienate, is void because repugnant to the estate." Also in *Bradley v. Peixoto*, 3 Ves. 324, it was held that an exception to the very thing itself by way of condition is null. 2 Bl. Com. ; 2 Washb. on Real Prop. 6, lay down the doctrine clearly that a condition subsequent, inconsistent with and repugnant to the amplitude of the powers of the estate granted, is void, and therefore no condition.

Now test this clause of Mrs. Elliott's will by this principle. It is conceded that an estate in fee was devised in the first instance

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by Mrs. Elliott to her son. The power of alienation belongs to a fee; in fact it is the very essence of a fee. Is the condition which the latter portion of the clause attempts to attach to the devise inconsistent with and repugnant to this devise? The performance of the condition would require Moore to die in possession of the real estate devised to him. In no other way could he leave a will disposing of it.

The condition then is a direct and positive restriction upon his powers of alienation. The will invests him with a fee, but the condition strikes at the very substance of this fee, and if valid would take away and destroy its most important and essential quality—the power of sale. A fee may be defeated by a condition which is independent of the estate granted upon the happening of which the estate is lost; but a condition, the effect of which is to cut down a fee to a less estate, is void because repugnant to the fee. Such is the character of the condition in this case, and according to the authorities cited is void.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

McIVER and McGOWAN, A. JJ., concurred.

PELZER V. CAMPBELL.

(15 S. C. 581.)

Marriage — wife's contract as surety — constitutional law.

The Constitution of South Carolina permits married women to acquire, and hold, and bequeath, devise or alienate property as if unmarried. The legislature enacted that they may contract as if unmarried. *Held*, constitutional, and that a married woman's engagement as surety is valid although not in terms charging her separate property.

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

J. L. Orr, for appellants.

Joseph N. Brown, contra.

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McGOWAN, A. J. This was an action on three notes, under seal, as follows :

“\$735. 88.

BELTON, S. C., *May 17, 1878.*

On the fifteenth of November next, we, or either of us, promise to pay to the order of Pelzer, Rodgers & Co., without off-set, seven hundred and thirty-five 88-100 dollars, value received. Witness our hands and seals.

“ A. R. CAMPBELL & Co. [L. S.]

“ MARY M. CAMPBELL. [L. S.] ”

[The other two omitted because in same form as above.]

A. R. Campbell and W. N. Mitchell, doing business at Belton, Anderson county, under the name and style of A. R. Campbell & Co., became indebted to Pelzer, Rodgers & Co., who agreed to give indulgence for the time indicated in the notes if the mother of A. R. Campbell, one of the firm, would sign the notes as surety. Campbell took the notes and returned them, signed by Mrs. Campbell. The plaintiffs accepted them and gave the indulgence.

Mrs. Campbell was not connected with the firm of A. R. Campbell & Co., and signed the notes only to enable them to get indulgence on the debt. The complaint stated that Mrs. Campbell was a married woman and owned in her own right a farm in Anderson county worth \$2,000. The principal defense was that Mrs. Campbell, being a married woman, had no legal capacity to make a personal contract upon which judgment could be recovered so as to bind her separate estate. The Circuit judge held that she had such capacity and was liable. The plaintiff had a verdict for the amount of the notes, and Mrs. Campbell appeals to this court upon the following exceptions.

[Omitting these, and the consideration of minor points.]

All the other exceptions in one form or another make the question that Mrs. Campbell, being a married woman at the time she signed the notes, without advantage to herself or her estate, had not legal capacity to make such a contract, and therefore is not liable.

The relation of husband and wife, whether we regard the responsibilities of the parties to each other, or to the community and its members, is the most important known to society; indeed, it is “the parent, not the child of society.” The exact *status* which the wife should occupy has always been a most fruitful source of

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discussion, especially as to her capacity to hold, change and dispose of property in her own right as separate from that of her husband. From the very nature of the subject it is not without difficulty. Husband and wife are separate, natural persons, with different faculties, sentiments and desires, and yet their relation makes them the heads of one family, with common interests, common hopes and common purposes. The doctrines of the old common law upon the subject are familiar. To speak in general terms, husband and wife are a unity, or as it was expressed by the great law-giver, "they twain shall be one flesh." The civil existence of the wife was merged in that of the husband, whose duty it was to support and govern the family, and to enable him to do so, he was, with small exception, entitled to the property, the earnings and the obedience of his wife, whose disabilities were complete.

In modern times the position of woman in the community, and particularly the wife, in regard to her husband, is different from what it was ages ago. But it is matter of wonder to observe what confusion still prevails, and how far the subject still seems to be from final and satisfactory settlement. Most of the States of the Union originally adopted the old common law of the mother country, modified as it had been by the introduction of trusts and the peculiar doctrine of "the separate estate of married women, created by act of the parties, and administered exclusively in courts of equity." But later, as property increased, and the relations of a highly-civilized society became more complex, there was developed a tendency to escape from what was regarded as the hard and unbending rules of the common law, and to bestow upon the wife a larger capacity to hold property in her own right, and to dispose of it without regard to the wishes of her husband. There is no doubt of such general tendency, but there never has been unanimity upon the subject. A part of every community adhered to the old rule as best calculated to promote harmony, prosperity and happiness, while another part pressed forward in the direction of what was called the civilized doctrine of emancipating the wife from the slavery of the old law, and re-endowing her with the faculties and rights of a human being.

In this modern reform most if not all the States joined, but not with even pace. Each made its own rules and regulations, and the result was an entire want of uniformity, and great confusion and perplexity in the principles applied to the vexed question of

"the separate estates" of married women. In the language of Mr. Bishop: "Since the confusion of tongues at the Tower of Babel there has been nothing more noteworthy in the same line than the discordant and ever-shifting utterances of the judicial mind on the subject of the power of a married woman, and her separate estate in the absence of specific provision in the deed of settlement. True there has been sometimes a language, which, though limited in its sphere, was tolerably plain, but no sooner was the language in the way of being understood, when lo! some conquering power of another sort came in, and all was confusion once more." 1 Bish. on Mar. Wom., § 847.

In this "sea of troubles" two currents of opinion were dimly visible, one holding that a married woman, as to her separate estate, was a *feme sole*, and as such entitled to exercise all rights not taken away from her, and the other maintaining that as to such property she was still under the disabilities of coverture, and entitled to exercise no rights, except such as were expressly conferred upon her by the deed creating the estate. The courts in this State always adhered to the latter opinion. *Reid v. Lamar*, 1 Strobh. Eq. 27. Around and between these two great leading currents there was every conceivable variety of opinion, expressed in qualifications, modifications, exceptions, explanations, etc. These intricacies and contradictions in the old law of the "separate estate," as created *inter partes*, were so great and bewildering that in considering questions growing out of our late laws, which create what is known as "the statutory separate estate," little assistance can be derived from the multitudinous decisions of other States upon the subject; none indeed except from the States which have laws similar to our own. On the contrary, the most laborious effort to harmonize and utilize these decisions will be found to be utterly hopeless, and indeed to make "confusion worse confounded."

For a series of years before the adoption of the Constitution, efforts were made in the legislature of this State to pass a law making the property of the wife her separate estate, not liable to the debts of her husband, without the necessity of a deed to that effect or the appointment of a trustee. In 1868 the Constitution was adopted, of which article XIV, section 8, declares as follows "The real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by

gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried; provided that no gift from the husband to the wife shall be detrimental to the just claims of his creditors."

Soon after the adoption of the present Constitution the legislature passed the "Act to carry into effect the provisions of the Constitution in relation to the rights of married women," ratified January 27, 1870 (14 Stat. 326), re-enacted in the General Statutes 482, which provides as follows: "That the real and personal property of a married woman, whether held by her at the time of her marriage, or accrued to her thereafter, either by gift, grant, inheritance, devise, purchase or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be her separate property."

SEC. 2. "A married woman shall have power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried; *and if dying intestate her property shall descend in the same manner as the law now provides for the descent of the property of husbands; and all deeds, mortgages and legal instruments of whatever kind shall be executed by her in the same manner, and have the same legal force and effect as if she were unmarried.*"

SEC. 3. "A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to contract and be contracted with in the same manner as if she were unmarried. That the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support," etc.

In the outset it is claimed that in the effort to ascertain the powers of a married woman we must look alone to the Constitution; that the act above cited purports to give to a married woman powers larger than those given by the Constitution, and to that extent is without authority and void; that the Constitution having undertaken to deal with the subject, its provisions are not merely fundamental, but legislative and exhaustive, and amount by implication to an inhibition against the legislature touching the subject. The parts claimed to be beyond the Constitution are in italics. There is nothing in the act inconsistent with or in opposition to the Con-

stitution, but merely supplemental thereto. Both are upon the same view and in the same line, the declared object of the act being "to carry into effect the provisions of the Constitution."

It is not perfectly clear that the provisions of the Constitution, necessarily stated in general terms, do not authorize the detail of particulars declared by the act. The first section of the act is in almost the very words of the Constitution. The same may be said as to the second section, with the exception that for the word "alienate" is substituted that of "convey," with an additional statement as to the modes of conveyance—"and all deeds, mortgages and legal instruments of whatever kind shall be executed by her in the same manner, and have the same legal force and effect as if she were unmarried." There is also in this section another addition, that upon the death of the wife intestate her estate "should descend as the law now provides for the descent of the property of husbands."

It is plain that these apparent additions were nothing more than stating fully and particularly what was properly inferable from the powers given in the Constitution "to devise, bequeath or alienate." So as to the third section. Can it be fairly and with entire confidence affirmed that the powers expressly given in the Constitution to acquire property "by gift, grant, inheritance, devise or otherwise," do not include and authorize the subordinate powers specified by the act, "to purchase property in her own name, and take proper legal conveyances therefor, and to contract and be contracted with?" It is asked with some force, how could she purchase or convey without the power to contract? It is insisted that the particulars of the act are nothing more than the filling up of the general outline indicated by the Constitution. The Constitution was adopted in 1868, and the act was passed in 1870 to a large extent by the same persons who had framed the Constitution; therefore according to contemporaneous construction the Constitution allowed the provisions of the act, and they are not inconsistent, but in harmony with each other. *Simpson v. Willard*, 14 S. C. 191.

But assuming that some of the powers given by the act are not fully covered by the said action, but are over and above and supplemental thereto, is the act unconstitutional as to such original provisions, although not in violation of the terms or contrary to the spirit of the said section? It is not contended that there is

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any express prohibition against the legislature passing the act, but that the very existence of the provisions of the Constitution negatives by implication the right of the legislature to touch the subject at all. It is no small matter to declare an act of the legislature unconstitutional. The legislature is the law-making power of the State upon all subjects not prohibited by the Constitution, every part of which should if possible be so construed as to allow full force to section 1, article III, which vests the full legislative power of the State in the general assembly.

"The English parliament in a political sense is omnipotent, but with us it is the people, and the people speak and act through the legislature, except when restricted by the Constitution of the United States or of the State. No statute can be disregarded unless a constitutional violation can be pointed out." *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 142; *Potter's Dwar.* 60-65; *Cooley on Const. Lim.*, §§ 87-173.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void on this ground, unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the Constitution must be specified, and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such result is one of delicacy and to be exercised always with caution." *Township v. Talcott*, 19 Wall. 673.

"The constitutionality of a law must be presumed until the violation of the Constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action, and the act be sustained." *Cooley on Const. Lim.*, § 87.

The general objects of a written constitution are to lay down the fundamental principles, and to limit the powers of government, and not to legislate on mere details. It is in its nature to be paramount, and in unchanging form is not suited to contain all the laws, which from time to time are necessary to conform to the ever-changing necessities and wishes of a people.

It is true that under certain conditions the power to legislate upon a subject may be taken away by a provision in the Constitution simply affirmative, as well as by express words, as where the provision is of such a nature that its purpose would be frustrated by further legislation on the subject, which occurs generally in

reference to modes of procedure, and in matters enumerated. But considering how easy it would have been to add words of exclusion, if such had been the intention, and that the alleged frustration of purpose must always be very much a matter of opinion, this "exhaustive grant" doctrine, excluding by implication the power of legislation, is not favored. Implied limitations of legislative power are only admissible when the implication is necessary, as where language, conveying a particular intent, cannot have its proper force without such implication. "It is not upon slight implication and vague conjecture that it is to be pronounced that the legislature has transcended its power, and that its acts are to be deemed void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Potter's Dwar. 65.

It seems that one of the rules of construction in such cases is this: If the provision introduces a new subject, and nothing appears to the contrary, that provision may be regarded as containing its own limit; but if the provision is upon the subject of ordinary legislation, in reference to which the legislature had acted before, that old right of legislation will not be taken away by implication, unless it is a necessary implication. Potter's Dwar. 72-74.

This rule has an illustration in the case of *Duncan v. Barnett*, 11 S. C. 933; s. c., 32 Am. Rep. 476, cited by the defendant. That case involved the point whether the act of 1872, exempting from levy and sale "one-third of the annual products of agricultural laborers," in addition to the exemptions allowed by the Constitution, was for that reason unauthorized and void. The Constitution contains two provisions on the subject of homestead exemptions. Article I, section 20, declares: "That a reasonable amount of property as a homestead shall be exempt from seizure and sale for the payment of debts," etc., and article II, section 32, indicates what is "a reasonable amount of property," by enumerating in detail the articles to be exempt, as follows: "The personal property of such person, of the following character, to wit: Household furniture, beds and bedding, family library, arms, carts and wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value in the aggregate the sum of \$500," etc. This latter section, like an ordinary act of the legislature, indicates clearly the articles exempt, and this particular enumeration implies a limit. The act assailed added a new article, not em-

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braced in the list, and it was held that "the legislature can exempt from levy and sale only such articles of personal property as are embraced within the enumeration contained in article II, section 32 of the Constitution."

In delivering the judgment of the court, Judge WILLARD said : "Until within a few years it has not been regarded as a legitimate exercise of legislative power to place the property of the debtor beyond the reach of his creditor, except to an inconsiderable extent.

* * * It may well be considered that in solving the question of the legitimacy of such legislation the Constitution had in view a limit that should be imposed to its unrestricted exercise. When it is treating of subjects that have been constantly dealt with by legislative bodies, with the sanction of the courts and the community, such an inference does not necessarily arise. In such cases some special ground would have to appear by inferring, in the absence of an express declaration to that effect, that the Constitution, in prescribing the mode in which a power of that class should be exercised, intended to exclude its exercise in any other mode."

The case before us is in several particulars different from that of *Duncan v. Barnett*. Here there is no second section filling up with particulars the general power given in the first, which office, in reference to the rights of a married woman, seems to have been performed by the act of the legislature now assailed; and besides, in the matter now under consideration, the Constitution was "treating of a subject that had been constantly dealt with by the legislature." The rights of married women have always been considered and treated as a legitimate subject of legislation in this State. Perhaps no other has been oftener before the legislature.

We can see no necessity for the implication in this case as drawn from the frame of the provision itself. It does not purport to be exhaustive or exclusive, but in terms is simply affirmative, and without words of negation. The maxim *expressio unius est exclusio alterius* cannot control the construction. That doctrine as to the effect of omissions under certain conditions might have some weight if in this case, as in *Duncan v. Barnett*, a new subject of legislation had been then and there introduced by the constitutional provision; but it is not perceived why it should be applied so as to limit by implication legislative powers which already existed in regard to an old and general subject of legislation.

Nor is there a necessity for the implication arising out of the

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nature of the subject. Based on the law, as it then stood, the main object of the provision in the Constitution seems to have been, not so much to declare the rights of the wife, as to negative those of the husband in regard to her property — not to enable her, but to disable him and his creditors, and therefore no exhaustive catalogue of all her powers was intended to be given, but only a mention, in general terms, of such of them as were incident to the main purpose of excluding the rights of the husband. As was said in the case of *Townsend v. Brown*,* lately decided by this court, in reference to the mode of renunciation of a wife's dower under our present laws: "The leading object of the section just quoted [under consideration here] appears to have been to relieve the property of the wife from liability for the husband's debts, and to relieve it from any control by the husband; for the first provision is to exempt the wife's property from levy and sale for the debts of the husband, and the second is to authorize the wife to dispose of her property without, and even against the consent of the husband. The real purpose therefore does not appear to have been to confer any new powers upon a married woman by changing her legal status, but simply to protect her property from liability for her husband's debts, and to release it even from the partial control of the husband by dispensing with the necessity, which had previously existed, of obtaining his consent and concurrence before her property could be disposed of. These seem to have been the real purposes of the clause in question, and as they can be fully accomplished without in any manner affecting any of the other relations between husband and wife growing out of marriage, we think we are bound to confine the operation of this clause of the Constitution to its declared manifest objects."

We conclude that there is nothing in the provision of the Constitution upon the subject of the rights of married women which excludes the legislature from passing any act upon that subject that is not in violation of the terms of that provision; and that the act of 1870, admitted to be in accord with both its terms and spirit, is constitutional, and has the force of law.

The only other question remaining is whether the defendant, Mrs. Campbell, is liable to be sued to judgment on the notes as her personal contract. After protecting the property of a married woman from her husband's debts, it seems to have been the inten-

* To appear in 16 S. C.

tion of the act to give to her the absolute right to contract without exception or qualification. The words are: "And to contract and be contracted with in the same manner as if she were unmarried; provided that the husband shall not be liable for the debts of the wife contracted prior to or after their marriage except for her necessary support." The proviso itself indicates that a married woman may contract debts after marriage other than those for her necessary support.

Wittsell v. Charleston, 7 S. C. 88, decided in 1875. In this case there was a separate estate created by will prior to the Constitution, and the principal question to consider was as to the effect the Constitution has upon a separate estate which was in existence at the time of its adoption, and upon that subject we make no ruling here. It was however held "that under article XIV, section 8 of the Constitution, a married woman has power to alienate her equitable estate in stock held by her at the adoption of the Constitution, and that she might pledge the same as security for her husband's debts." In referring to the married woman provision of the Constitution in this case, the court says: "Its object was to enlarge what was before known as the wife's separate estate, so as to embrace all acquisitions, past or future, of such nature that if she were a *feme sole* they would vest in her as property, and to enlarge her powers over such property to the same extent as if she were a *feme sole*, and at the same time to shield that separate estate from liability to the husband's debts against her will. * * * Now that the Constitution has reversed the rule of the common law, and substituted general competence for the former rule of incompetence as it regards the holding and acquisition of real estate, it is not for the courts, on nice readings of its text, to restore a state of things from which the courts of equity have long striven to be released. * * * We have been referred to cases decided in the courts of other States on statutes similar in their general intention to our own, some regarded as favoring the view that has been expressed, and others as opposing it. When the construction of our own Constitution is free from doubt, little aid can be obtained from the decisions of the courts of other States. In the present case the meaning of our Constitution is free from doubt, and it demands interpretation at our hands according to the expressed intent of the people of the State who framed it as our organic law."

Ross v. Linder, 12 S. C. 592, decided in 1879, is the only other case in our reports upon the subject. In that case in considering the question whether the husband was a substantial or merely a formal party, the point arose incidentally whether a married woman could bind herself by a general personal engagement. It was held "that the ability of a married woman to bind herself by a contract cannot be disputed under the provisions of General Statutes 482."

In some of the State in which the power to contract has been given to a married woman, exceptions have been introduced limiting that power. In New York and New Jersey she is expressly restrained from assuming a liability as surety, but in Illinois she is not. The sixth section of the married woman's act of Illinois is in these words: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried, but except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is an idiot or insane, or is confined in the penitentiary." Rev. Stat. Ill., 1874, p. 576.

A question arose in the State of New Jersey as late as 1879, in regard to the liability of a married woman as surety for her husband, contracted in the State of Illinois, and the court of New Jersey, notwithstanding the express exception in their own law, held that the contract must be enforced according to the Illinois law, and that under the section above cited the wife was liable, and judgment was given accordingly. *Wright v. Remington*, 41 N. J. 51; s. c., 32 Am. Rep. 180. In delivering the judgment, Justice REED said: "The proviso contained in the fifth section of our married woman's act is absent from the Illinois statute, and there appears in the latter no restriction upon the contractual ability of the married woman to become indorser, surety or guarantor. Subject to the exceptional instances of her engaging in partnership business, she is as unrestricted as a *feme sole*. There can therefore be no question but that the contract was valid by the law of Illinois. It is the duty of the courts of this State to recognize and enforce it unless it appears injudicious to the interests of the State or of our citizens. But nothing approaching this result can be deduced, solely from the fact that the foreign statute confers upon the married woman the power to make a contract of suretyship.

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That it would have been an act of legislative wisdom to have incorporated into the Illinois act a provision similar to that in our own and the New York State married woman's act, by which the married woman is restrained from assuming a liability as surety, I think the testimony in this case demonstrates. But whatever may be our opinion of the policy of legislation beyond our State we are bound by the principles of comity to recognize its validity," etc.

In Massachusetts, under the act of 1874, which provides that "a married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were *sole*, except that she cannot 'convey' property to or make contracts with her husband," it has been held that a married woman was liable on a promissory note, although the consideration for the note was a debt of the husband. *Major v. Holmes*, 124 Mass. 108; *Kenworthy v. Sawyer*, 125 id. 28; *Goodnow v. Hill*, id. 588.

In Maine, under an act of 1866, declaring that "the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were *sole*," it was held "that a married woman was liable as surety on a note." *Mayo v. Hutchinson*, 57 Me. 547. In this case the court quaintly remarked "that the legislatures of this State have been gradually enlarging the rights and extending the liabilities of married women. The wisdom or expediency of the act is matter solely for the legislature. Its language is not general, and there can be no reasonable doubt of its meaning. A contract of suretyship is a lawful contract, and for a lawful purpose. It is valid and binding on a married woman. The married defendant may have been indiscreet in entering into it, but that is not the fault of the plaintiff. Almost all who sign as surety have occasion to remember the proverb of Solomon: 'He that is surety for a stranger shall smart for it; and he that hateth suretyship is sure.' But they are nevertheless held liable upon their contracts, otherwise there would be no smarting and the proverb would fail."

In Kansas, under a like statute, it has been held that a married woman was liable on a note signed by her, and she was not permitted to allege that she did not intend to charge her separate estate. *Deering v. Boyle*, 8 Kans. 529; *Wicks v. Mitchell*, 9 id. 88.

In Ohio the act of 1866 makes the property of a married woman

her separate estate, but no special power to contract is given ; yet in the case of *Williams v. Urmston*, 35 Ohio St. 296 ; s. c., 85 Am. Rep. 611, decided in 1880, it was held that a married woman, having a separate estate, may charge the same in equity by the execution of a promissory note for her husband or another. From the execution of a note a presumption arises that she thereby intends to charge her separate estate with its payment. Overruling *Levi v. Earl*, 30 Ohio St. 147, and *Rice v. Railroad*, 32 id. 380 ; s. c., 30 Am. Rep. 610.

In New York there is given to a married woman no express power to contract ; but in the case of *Manhattan Co. v. Thompson*, 58 N. Y. 84, Judge CHURCH seems to lament the absence of such power, in these striking words : " If, when the legislature changed the common law in essential particulars, in regarding the interests in property of the husband and wife to a considerable extent as distinct and independent, and in recognizing the capacity of the wife to judge and provide for what her welfare requires in acquiring and holding the legal title to property, and managing and disposing of the same as if unmarried, and without subjection to the control of the husband, the courts had adopted as a reasonable and legitimate sequence the correlative rule of capacity to contract debts as if unmarried, restricted only to their collection from separate property, it might well be claimed that the rights of married women would have been as well, if not better, protected practically, sound public policy and business morality more promoted, and a flood of expensive and vexatious litigation prevented." Mr. Wells, in commenting on these views of Judge CHURCH, remarks : " Manifestly it must come to this everywhere."

In the case before us, Mrs. Campbell did not sign as surety for her husband, but for the firm of A. R. Campbell & Co., of which her son was a member. Therefore none of the considerations of bad policy as to the wife's being allowed to sign as surety for her husband apply here. But in considering the general subject, it is proper not to overlook the dangers of such a power under all circumstances.

It has been strongly urged upon us that to give a married woman the unrestricted right to bind herself by contract must result in the destruction of her separate estate ; that so far as her property is concerned, it will put her absolutely in the power of her husband, if not under his baronial authority, certainly under the influence

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of her affection for him ; that every good wife will contribute her last cent to promote the success or to maintain the credit and honor of her husband. It is not for this court to consider the wisdom or policy of the law. That is exclusively for the legislative branch of the government. Our duty is simply to announce what the law is — not what it should be. It may not however be inappropriate to say that all the old confusion would at once follow the renewed effort to give the wife two inconsistent characters — that of a *feme sole* without disabilities as to the power to acquire and hold property, and that of a *feme covert* under disabilities as to the mode of charging that property and making it liable for her contracts. With every enlargement of the rights of a married woman should come a corresponding increase of her responsibilities. When they take the right to control their separate estates they assume the risks of such control. When the law gives them the privileges of separate individual citizens, they take with it the responsibilities and dangers of such citizens. Given the right to contract, they assume the liabilities of contractors. At first, hardships may in isolated instances ensue from the inexperience of women in matters of business, but such hardships always arise upon any change in the rules of property or business.

We cannot refrain from making the further observation that if the apprehended consequences should to some extent follow the radical change in the law, some compensation may be found in its tendency from another direction, to restore the old condition of absolute unity in interest of husband and wife. In the language of Chancellor WARDLAW : “ We trust it may never be considered improper for the wife to contribute by all lawful means to the success of her husband’s enterprises. In many cases it is both politic and dutiful that such power should be exercised.”

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

SIMPSON, C.J., and MOLVER, A.J., concurred.

CASES

IN THE

COURT OF APPEALS

OF

VIRGINIA.

NIEMEYER V. WRIGHT.

(75 Va. 239.)

Contract — validity — non-compliance with statutory requirement.

Statutes required of sellers of commercial manures the observance of certain conditions, under penalty, but did not declare contracts for sale void for the non-observance. *Held*, that a seller might recover on such contract, although he had failed to conform to the statutory requirements.*

ACTION on note and account. The opinion states the case.
The plaintiff had judgment in part.

Walke and Old, for appellants.

Ellis and Thorn, for appellee.

BURKS, J. The instruction complained of here, which was given to the jury by the learned judge on the trial of this case in the court below, is based on the assumption that if the bags or sacks containing the guano sold by the plaintiffs to the defendant

*See *contra*, *Woods v. Armstrong* (54 Ala. 150.), 25 Am. Rep. 671, and note, 674.

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were not labelled as required by the act of March 29, 1871, or if before the sale no samples of the fertilizer were submitted to the commissioner of agriculture to be tested by him, as the act of March 29, 1877, enjoins, the contract, which was the ground of the action, was illegal and void, and therefore no recovery could be had upon it.

The first section of the act of 1871 (Acts 1870-71, ch. 227; Code of 1873, ch. 86, § 48) requires that all commercial manures and artificially manufactured or manipulated fertilizers, brought or manufactured in this State for sale, and sold, or kept for sale therein, shall have permanently affixed to every sack, bag, barrel, box or other package thereof, a stamped or printed label, which shall specify legibly the name or names of the manufacturer or manufacturers, his, her, or their place of business, the net weight of such sack, bag, barrel, box, or other package, the component parts of such manure or fertilizer, and the percentage by weight, which it contains of certain constituents specified.

The second section imposes a fine of one hundred dollars for the first offense, and two hundred dollars for the second and each succeeding offense, on any person who shall sell, or keep for sale any commercial manures, or artificially manufactured or manipulated fertilizers, not labelled in accordance with the requirements of the act, or shall affix any label to any sack, bag, barrel, box, or other package, not expressing truly the component parts of said manures or fertilizers, or expressing a larger percentage of the constituents, or either of them mentioned in the first section, than is contained therein.

The fourth section declares that the words used in the act, "commercial manures, artificially manufactured, or manipulated fertilizers," shall be taken and construed to include all manures and fertilizers which shall be sold for a greater price than three-fourths of one cent per pound.

The act of March 29, 1877 (Acts 1876-77, ch. 249), establishes a department of agriculture, mining, and manufacturing for the State, to be under the control and management of an officer designated "commissioner of agriculture."

Section 4 of the act directs that this officer shall have under his charge the analysis of fertilizers sold to be used for agricultural purposes in this State, and enacts that a fair sample of every brand of fertilizers sold to be used in the State shall be first submitted

to him, and when he shall have thoroughly tested the same, which it shall be his duty to do, if he shall find the same to be of no practical value, he shall summon before him the parties interested, and give them a full and sufficient opportunity of correcting any injustice which may have been done to them by mistake, accident, or otherwise ; and if it shall still be found that the brand is of no practical value, the sale of the same for use in this State as a fertilizer shall be prohibited. A fine not less than one hundred dollars nor more than one thousand dollars for each offense is imposed on any person violating the provisions of the act, by selling any fertilizer to be used in this State, without first submitting a fair sample of the same to the said commissioner, under rules prescribed by him.

It is not pretended that either of these statutes expressly forbids the sale of guano and other fertilizers, or declares in terms that such sale shall be void unless the provisions concerning the label and analysis shall have been first complied with ; but the contention is that the illegality impliedly results from the penalties imposed.

It is conceded that as a general rule, a contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so (*Middleton v. Arnolds*, 13 Gratt. 489), but it does not necessarily follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. The question is in a great measure one of legislative intent, and its determination depends, as in other cases, on the construction of the statute.

Such was the conclusion of the Supreme Court of the United States in *Harris v. Runnels*, 12 How. 79 (decided in 1851), after an examination of the authorities on the subject. In delivering the opinion of the court, Mr. Justice WAYNE adverted to the distinction taken in the English cases, when the rule which avoids a contract made in contravention of a statute is to be applied to statutes made for the protection of the revenue, and when the same rule is to be applied to those statutes which are made for the protection of the public from moral evils, or from those which it is known by experience society must be guarded from by preventive legislation ; and after stating the rule as laid down by Baron PARKE in *Cope v. Rowlands*, 2 M. & W. 149, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute

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which has made it so has in view the protection of the revenue or any other object, said that "whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application is denied. It is true that a statute containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition. But it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

"It is not necessary however that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislatures do not think the rule one of universal obligation, or that upon grounds of public policy it should always be applied, is very certain. For in some statutes it is said in terms that such contracts are void; in others that they are not so. In one statute there is no prohibition expressed, and only a penalty; in another there is prohibition and penalty, in some of which contracts in violation of them are void or not, according to the subject matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

This full extract from the opinion shows the principles on which the decision of the court was based. The action was upon a note given for the price of slaves, which, as admitted by the pleadings, had been brought into the State of Mississippi and sold in violation of a law of the State, and the defense was that the contract of sale

and the note were void because they were in contravention of the statute. The object of the statute was to prevent the introduction of convicts into the State, and to effect that object the importation of all slaves was subjected to regulation. The act declared that it should not be lawful (Hutchinson's Mississippi Code, 1798 to 1848, p. 513) for any person to import slaves into the State without having previously obtained a certificate, duly acknowledged, etc., of two freeholders in the county of the State or territory from which the slaves were brought, descriptive of the slaves, and that they had not been guilty or convicted of any felony. The seller was required to register the certificate in the Orphans' Court; and it was further enacted that if any person sell or purchase any slave or slaves without having complied with the provisions of the act, he should pay one hundred dollars for every slave so sold or purchased.

There were other provisions of the act which need not be noticed. It is to be observed that while the act declared that it "should not be lawful" to import slaves without complying with the regulations prescribed, it does not declare in terms that a contract in contravention of the statute should be void. It only imposed a penalty on seller and buyer for a violation of the provisions. The Supreme Court was of opinion, upon a consideration of the whole statute, that notwithstanding the penalty inflicted, it was not the intention of the legislature to make the contract void.

There are adjudications of this court to the like effect. The statute "against conveying or taking pretended titles," enacted in 1786 (see 1 R. Code of 1819, ch. 103). continued in force until its repeal at the revival of 1849. That act expressly prohibited the conveying or taking "pretended titles," and inflicted upon the offender a forfeiture of the whole value of the lands; and yet it was uniformly held by this court, that although the conveyance was prohibited under the penalty of forfeiture, it was not therefore void, nor were the obligations for the purchase-money of the land so conveyed invalid. *Middleton v. Arnolds*, 13 Gratt. 489, and cases there cited.

In *Tabb v. Baird*, 3 Call. 481, Judge ROANE said: "It is to be observed that the act against pretended titles does not declare the conveyances therein inhibited to be void. It leaves the effect and legal operation of such conveyances to be decided by the laws relative to the subject."

These cases are sufficient to show that conceding the general rule to be, as it has been stated, the mere imposition of a penalty by a statute for doing or omitting to do an act, does not of itself, in every case, necessarily imply an intention of the legislature that every contract in contravention of the statute shall be void "in the sense that it is not to be enforced in a court of justice."

While the decisions in *Redd v. Jones*, 30 Gratt. 125, and *Wroten's Assignee v. Armat*, 31 id. 228, are not directly in point, they have a strong bearing on the question under consideration. See also, *Larned v. Andrews*, 106 Mass. 435 ; s. c., 8 Am. Rep. 346 ; *Aiken v. Blaisdell*, 41 Vt. 655 ; *Pangborn v. Westlake*, 36 Iowa, 547 ; *Watrous v. Blair*, 32 id. 58 ; Benjamin on Sales, §§ 535-540.

The sections (already referred to) of the acts of 1871 and 1877, show nothing beyond the duty enjoined upon the manufacturer and vendor of the fertilizers, and the penalties imposed for non-compliance with the provisions of the several acts. The penalties are pecuniary fines, and there is not to be found anywhere in either of the acts any express prohibition of sale (except where the commissioner of agriculture has pronounced a fertilizer of no practical value), nor any declaration that contracts connected with, or arising out of sales made without compliance with the provisions of the acts, shall be void. But we think the third section (not before referred to) of the act of 1871, shows very clearly, that it was not the intention of the legislature to render the contracts between the seller and purchaser void. By that section it is enacted, "that any purchaser of commercial manures or artificially manufactured or manipulated fertilizers, bearing labels as provided for in the first section of this act, who shall be injured or defrauded by the contents of the sacks, bags, barrels, boxes, or other packages, not conforming in quality and quantity to the labels thereof, may recover from the seller or sellers thereof, by proper action at law, an amount equal to the purchase-money of such manure or fertilizer."

Now, the special remedy here given to the purchaser is in effect equivalent to a legislative declaration of a forfeiture by the seller to the purchaser, in the particular case provided for, of the whole of the purchase-money of the fertilizer sold, without regard, it would seem, to the extent of the injury sustained ; and the infliction of the forfeiture in one aspect is the exclusion of it in any other. The remedy is given only when the purchaser is injured or

defrauded by means of a false label ; and this implies that where there is no injury from such cause it is intended that the contract shall operate between the parties as in ordinary cases. When, in framing the statute, the mind of the legislature was engaged in devising means for the protection of the purchaser, and hence a special remedy was provided for injury inflicted by false labels, if the intention had been, as a means to the same end, to render void every contract made in contravention of the act, that intention would doubtless have been plainly expressed in terms.

There is some force in the argument addressed to us, that the express prohibition in the act of 1877 of the sale of a fertilizer ascertained by the commissioner of agriculture to be of no practical value, implies that no absolute prohibition was intended under different circumstances, and that while in the act of March 15, 1850 (Acts of 1849-50, ch. 64), it was declared in expressed terms "that it shall not be lawful" to sell guano and plaster paris without inspection, etc., as provided, no such language is to be found in the statute of 1871, which was substituted for it. But independently of these suggestions, we are of opinion, for the reasons already stated, that it was not the intention of the legislature that contracts in contravention of the statutes which have been considered should be void, in the sense that they should not be enforced in a court of justice, and therefore that the Circuit Court erred in the instruction given to the jury.

The construction we have given these statutes, severely penal as they are, seems to us to be in accordance with the rules of the judicial interpretation applicable to such cases and to be subservient to the ends of justice ; but if the acts as construed should be deemed inadequate to the prevention of the mischief against which they are directed, the corrective power is in the legislative department of the State.

The conclusion already reached makes it unnecessary to decide the question raised by the plaintiff in error, whether the title of the act of 1871 is in conformity with the Constitution of this State (art. 5, § 15), which declares that "no law shall embrace more than one object, which shall be expressed in its title."

The judgment of the Circuit Court must be reversed and the cause remanded for a new trial.

Reversed and remanded.

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Wendlinger v. Smith.

WENDLINGER V. SMITH.

(75 Va. 309.)

Contract — condition — parol evidence.

An executor contracted to sell land by a contract perfect and absolute on its face ; but annexed was a paper purporting to be an approval of the contract by the devisees, signed and sealed by four, and with five other seals with no names attached. *Held*, that parol evidence was competent to show that the written approval of the nine devisees was a condition of the contract.*

ACTION to enforce a mortgage. The opinion states the case. The plaintiff had judgment below.

Guy & Gilliam, Keiley and T. N. Page, for appellant.

Sands, Leake & Carter, Johnson, Williams & Boulware, and *E. Y. Cannon*, for appellees.

BURKS, J. The contract of June 26, 1873, between Goddin, as executor of Vial, of the one part and the appellant Wendlinger of the other, for the sale by the former to the latter of certain real estate in the city of Richmond, is the subject of controversy in this case. The contention in the court below was by the executor that the contract was a valid subsisting obligation, and should be enforced, and by Wendlinger that it was subject to a condition, which never having been performed, the contract never took effect.

By the decree appealed from the chancellor decided that the contract was binding on the parties, and that Wendlinger as purchaser should comply with the terms ; in other words, the decree was substantially that the contract should be specifically performed.

[Minor matter omitted.]

The decree is based on the opinion of the chancellor expressed that the contract " is absolute on its face, and was and is not dependent upon the assent of the devisees of S. P. Vial, deceased ; and that it is incompetent to admit parol testimony for the purpose of altering said contract ;" and therefore the deposition of Robert G. Scott and the statement of Goddin, which were excepted to, were excluded as evidence.

* See *City of Chicago v. Gage* (95 Ill. 593), 35 Am. Rep. 153.

If the excluded evidence was in law admissible, it seems quite clear to us that it was error to decree that the covenant of 1873 should be carried into execution, as a subsisting contract binding on the parties.

This evidence (without meaning to state it in detail) shows very satisfactorily that the contract for the sale of the property was conditional. It was to be effectual if, and not unless and until the devisees of Vial should approve and ratify it in writing ; and it is not claimed that such approval and ratification by all the devisees were ever secured. Mr. Scott was Wendlinger's counsel, and he raised the question whether Goddin as executor had the right to sell and convey the property under Vial's will ; and he says he recollects that to remove this difficulty, it was agreed between Wendlinger and the executor, that the consent of the parties interested, the devisees under the will of Vial, to the contract for the sale of the property, should be given in writing. Not long after this Wendlinger was informed by Goddin's clerk that the signatures of some of the devisees to the written assent to the sale could not be obtained — that they had refused to sign it ; and thereupon Scott, as the legal adviser of Wendlinger, counselled him not to take the property, etc.

The statements of Scott are strengthened by facts and circumstances made to appear by other evidence not excepted to in the cause.

In the first place, the writing appended to the covenant in 1873, in the possession of Goddin, would seem to indicate that something remained to be done to give effect to the covenant as a completed obligation. The writing is immediately below the signatures to covenant, and is in form and of the terms following :

"We, the undersigned devisees under the will of the late Seymour P. Vial, deceased, do hereby ratify, approve and confirm the foregoing contract.

“Witness the following signatures and seals.

"WM. S. BAILEY.	Seal.
"VIRGINIA M. BAILEY.	Seal.
"J. B. EZELL.	Seal.
"MARY O. EZELL.	Seal.
"_____.	Seal.
"_____.	Seal.
"_____.	Seal.
"_____.	Seal.
"_____.	Seal.

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Then the conduct of the parties, after the contract was entered into, tends strongly to show that it was regarded by them of no continuing binding force. If effectual, it is conceded that the lease of May 2, 1865, was in that case wholly superseded. And yet Wendlinger continued to pay, and Goddin to receive, rent under that lease until sometime in the year 1875, when the present controversy arose, and moreover, in the meantime, no interest was demanded or paid on the purchase-money for the lot alleged to be sold to Wendlinger, though such interest was accruing from time to time under the covenant if operative. Again the unsuccessful negotiations for the sale between Goddin and Wendlinger in April, 1875, seem to be wholly inconsistent with a previous and then subsisting contract for sale under the instrument of June 26, 1873.

So we think the facts and circumstances in this case, independently of the evidence excluded by the chancellor, give strong support to the appellant's claim, that the covenant of 1873 was upon a condition precedent to be performed by Goddin, which was never performed by him, and the contract therefore never took effect—that it was in fact wholly inoperative. If however the excluded evidence be admitted, we are of opinion that the existence of the alleged condition, and its non-fulfillment by Goddin, is abundantly proved.

Whether therefore this evidence was admissible, is the only remaining question to be decided; and we are of opinion that it was admissible, and that the learned chancellor below erred in excluding and disregarding it.

It was not offered with the view to contradict, or vary, or even explain the language employed in the written instrument, but to establish a fact or circumstance collateral to the writing, which would control its effect and operation as a binding engagement. The body of the covenant in its terms is plain enough, and it is absolute, but the writing annexed or appended is presumably a part of the instrument, to which it expressly refers, and manifests unequivocally the intention that all of the devisees of Vial should approve and ratify it. 1 Dan. Neg. Inst., § 154, and cases cited in note (1), especially *Fletcher v. Blodgett*, 16 Vt. 26; *Jones v. Fales*, 4 Mass. 245. Whether this notification was to be a condition upon which the covenant should take effect and be binding on the parties, we are unable to determine with certainty from an inspection only of the writings, but under the decisions of the court,

the incompleteness of the instrument as a deed apparent on the face of it, taking the writing appended as a part of or connected with it, warrants the introduction of parol evidence to prove the existence of such a condition. We need only refer to *Hicks v. Goode*, 12 Leigh, 479 (37 Am. Dec. 677); *Ward v. Churn*, 18 Gratt. 801; *Nash v. Fugate*, 32 Gratt. 595; s. c., 34 Am. Rep. 780.

These cases establish the proposition, that the rule of law, that a deed cannot be delivered to a party to whom it is made as an escrow, to be the deed of the obligor only on condition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; not to deeds which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties. In *Nash v. Fugate*, *supra*, the names of none of the contracting parties were inserted in the body of the bond, which was the subject of controversy. It was signed by the principal obligor and nine others claiming to be sureties. There was nothing in the form or language of the bond to indicate that other persons were to sign it before it could take effect as to the parties who had signed it. And it was held, that the fact that there were scrolls to which there were no names, did not render the instrument incomplete, or even tend to show an agreement that other parties were to sign in order to give effect to the bond.

But in the present case, the writing appended to the covenant in the possession of Goddin shows clearly on its face an intention that all the devisees of Vial should, by signing the writing, declare their approval and ratification of the covenant. It is true they are not mentioned by their names in the body of the writing; but with as much certainty as if particularly named, they are described collectively as "the undersigned devisees under the will of the late Seymour P. Vial," and corresponding scrolls were subjoined to which their signatures were to be prefixed. According to the authorities which have been cited, it was perfectly competent for Wendlinger to prove, as he offered to do by parol evidence, that he delivered this covenant to Goddin to take effect only on condition that all of the devisees of Vial should give their written assent to

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the covenant, as the writing shows was contemplated. See also what was said by Judge DANIEL in *Smith's Ex'r v. Spiller*, 10 Gratt. 318, 324.

The view we have taken of this case makes it unnecessary to consider other grounds, plausible and of much force, upon which the learned counsel of the appellant contended that the evidence excluded by the chancellor should have been received and considered.

For the reasons stated, we are of opinion that the decree of the Chancery Court of the city of Richmond is erroneous, and should be reversed, and the cause remanded for further proceedings.

Judgment reversed.

STONESTREET V. DOYLE.

(75 Va. 364.)

Trust — Illegal for uncertainty.

A devise in trust to build a free school-house, and extend the education of poor children, is void at law for uncertainty. (*See note, p. 733.*)

EJECTMENT. The opinion states the point. The plaintiff had judgment below.

White & Garnett and Ellis & Thom, for appellants.

J. Devereux Doyle, for appellees.

STAPLES, J. The subject of this controversy is a valuable lot in the city of Norfolk. By the will of Walter Herron, admitted to probate in 1838, it was devised to Col. Robert E. Taylor, John N. Tazewell, William Seldon, Jr., and William E. Cunningham, as trustees, to take charge of and build thereon a large and commodious academy, for the purpose of establishing a free school, and extending the education of poor children.

The first question presented for our determination is whether this devise is void, on account of its uncertainty as to the beneficiaries who are to take. That it is void seems to be very clear un-

der the decisions of this court in *Gallego's Ex'r v. Attorney-General*, 3 Leigh, 450 (24 Am. Dec. 650); *Kelley v. Love's Adm'rs*, 20 Gratt. 124; unless indeed it can be brought within the influence of the principles laid down in *Literary Fund v. Dawsons*, 10 Leigh, 147; *Kinnaird v. Miller's Ex'r*, 25 Gratt. 107; and *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99.

In these latter cases it was held, that whilst a devise *in præsenti*, to take effect immediately on the death of the testator, is void where the beneficiaries are numerous and uncertain; it is otherwise if the devise be executory in its nature, to take effect upon condition that an act of incorporation be obtained within a reasonable time; that is to say, a life or lives in being, and twenty-one years thereafter.

In the *Snug Harbor* case the devise was for the support of aged and worn-out sailors, and the testator declared if the purpose he had in view could not be accomplished without an act of the legislature, he desired that such an act should be obtained as early as practicable, incorporating the trustees named by him, which was accordingly done within a few years after his death.

In *Literary Fund v. Dawsons*, 10 Leigh, 150, the testator placed the whole subject of his devise under the control of the legislature; and he expressed the confident belief that an act might be obtained giving effect to his wishes. This court held that these provisions of the will were equivalent to a devise to the executors in trust for the purpose of procuring the passage of a necessary law on the subject; and if this should be done within a reasonable time no difficulty could arise in carrying out the wishes of the testator.

In all these cases the devise is to be regarded as having been made to a corporation to be created by act of the legislature; and when so created the corporation takes the estate and executes the trust according to the plain intention of the deviser.

It is insisted that these principles apply to the present case; that this is an executory devise, having in view an act of incorporation to be obtained by the trustees named by the testator, if the same shall become necessary.

A careful examination of the will fails to show that the testator entertained any doubts of the validity of his devise to the trustees, or even supposed that any law was necessary to give effect to his bounty.

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If indeed he contemplated any legislation on the subject at all, it was not to make valid his devise, but to authorize the grant from the literary fund. His direction was that the trustees should take charge of the lot, and appropriate it to the use of a free school, and build thereon an academy by subscription, or a grant from the literary fund, or otherwise.

The trustees were gentlemen of high character, and marked influence in the community, in whom the testator had implicit confidence. He left to them the choice of the means necessary to secure the funds for the erection of the building; merely suggesting for their consideration that the money might be raised by private subscription, or by a grant from the literary fund, or in some other mode.

He also suggested that the trustees of the Norfolk academy might be induced to unite the proceeds of a lot they were about to sell with the means he had provided, and he expressed the hope and belief that the council and borough of Norfolk would liberally contribute to the enterprise.

Whatever doubts the testator may have had with respect to the mode of raising the necessary funds for the building it is apparent he entertained none as to the validity of his devise.

It was not intended to be an executory devise to a corporation, not in *esse* to be thereafter created, but a devise *in præsenti*, to four trustees named, to take charge of and hold the lot in controversy immediately upon his death. The case is therefore directly within the influence of the rule laid down by the Supreme Court of the United States in *Baptist Association v. Hart*, 4 Wheat. 4, in which it was held that the devise was *in præsenti* to take effect upon the death of the testator; and as the association was not incorporated, and as there was no executory bequest over to the association if it should thereafter obtain an act of incorporation, the devise was void for uncertainty.

[Omitting other matters.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Riser v. Perry*, 55 Md. 113, there was a gift by will to trustees of the Mary Hove School Home, in Cumberland, Maryland, for educational purposes, and to the African Missionary Society, for converting and christianizing the African race. Neither beneficiary was incorporated. *Held*, void for uncertainty and indefiniteness.

To same effect. *Nichols v. Allen*, 130 Mass. 311; 8. c., 39 Am. Rep. 445, and note, 453.

RICHMOND AND DANVILLE RAILROAD COMPANY V. MEDLEY.

(75 Va. 499.)

Negligence—fire—railroad allowing combustibles to accumulate along track—contributory negligence.

It may be negligent in a railroad company to allow combustible matter to accumulate on its land along its track.

One owning land adjoining a railway is not bound to keep it clear of combustible matter along or near the track.*

ACTION of damages for injury by fire. The opinion states the facts. The plaintiff had judgment below.

H. H. Marshall, for appellant.

H. Edmonds, for appellee.

STAPLES, J. Upon the trial of this cause in the court below the defendant, after the conclusion of the evidence, asked for an instruction, which was given by the court. The jury, notwithstanding the instruction, found a verdict for the plaintiff. The defendant submitted a motion for a new trial, which was overruled, and an exception taken. The point relied upon by the defendant is, that the finding of the jury is in direct contravention of the ruling of the court, to which no exception was taken by the adverse party. It will be only necessary to give so much of the instruction here as is sufficient to explain the subject matter of controversy. It declares substantially, if the jury are satisfied that the company at the time of the accident had in use an engine properly constructed and in good order, with the most approved and extensively used apparatus for preventing the emission of sparks, operated with reasonable care and diligence by competent engineers and agents, it is not responsible for any injuries incidentally resulting to the plaintiff from the exercise of the company's right to propel locomotives by steam on its track, even though the fire complained of originated from the engine in question.

This instruction, to the full extent of the proposition involved, is

* To same effect, *Louisville, etc., Ry. Co. v. Richardson* (86 Ind. 45), 23 Am. Rep. 94, and note, 68.

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undoubtedly correct and is warranted by the facts proved. It will be perceived however it entirely omits one very essential element in its exposition of the duties imposed on the defendant. It makes no reference whatever to the dry grass and other combustible matter on the company's right of way which were ignited by the sparks from its own locomotive, and were the main cause of the fire on the adjoining lands of the plaintiff. A railway company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, operated by the most skillful engineers. It may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most improved and best constructed machinery. Many of the authorities hold that to allow the accumulation of such matter is *per se* negligence, which will render the company responsible if loss ensues. Others hold, and perhaps with better reason, that it is a question for the jury to determine upon all the circumstances of the case. And this was the view taken by this court in *Brighthope Railroad Company v. Rogers*, decided at the present term of this court. All the authorities, with a few exceptions, go to that extent, and the liability of the railroad company for this species of negligence is generally conceded.

As has been already seen, this most important element in determining the question of defendant's liability is omitted in the defendant's instruction. The plaintiff not having objected to it however, cannot be heard to complain in this court that it was given. Still if the verdict appears to be correct, it cannot be set aside because it is contrary to any erroneous ruling of the court. Had the verdict been in conformity with the instruction great difficulty might arise in interfering with it, because a party objecting to an erroneous instruction must do so at the time, otherwise, in general, he will be considered as having waived the objection. But

where the verdict is right it will not be set aside because it is in conflict with an erroneous ruling of the court. There is no doubt but that the jury in this case thought the company guilty of negligence in permitting the dry grass and broom-sedge to remain on its lands, and upon that theory the verdict was rendered. This plainly appears by the second bill of exceptions, in which it is stated, that after the defendant's instruction was given, the plaintiff's counsel argued before the jury that the dry grass and broom-sedge which was allowed to remain near the track, and which it was argued caught fire from the sparks of the engine, was sufficient to charge the defendant; and this, says the learned judge, "was allowed to go to the jury without any instruction on that subject being asked or given." It would seem from this that no objection was made on the part of the defendant to the line of argument pursued by plaintiff's counsel as being in conflict with the instruction.

[Omitting a question of fact.]

The next point for consideration is, whether the plaintiff was guilty of contributory negligence in not removing the combustible matter from his own land which was ignited by the fire first started on the defendant's right of way. All that we have on this subject is a line or two in the certificate of facts, in which it is stated that the ground where the fire first caught was covered with grass and broom-sedge, precisely as the field extending from the line of the railroad to the first piece of woodland was covered; from which it may be inferred that the plaintiff's land adjacent to the railroad was covered with dry grass and broom-sedge to the same extent as was the defendant's right of way. The point is made that the plaintiff, by his failure to remove the same, directly contributed to the injury which he sustained. It has been long settled, however, that the doctrine of contributory negligence does not, as a general rule, apply to this class of cases. No obligation rests upon the owners of property along the line of a railway to keep it in a condition to be always safe from the fires thrown from passing engines. They are not bound to remove combustible material on their own land in order to obviate the consequences of possible or even probable negligence of the company. If the proprietor of adjacent lands leaves his property in an exposed condition, and it is destroyed by fires from the company's furnaces without fault or negligence on the part of the latter, it may be conceded, for the purposes of the argument, that the owner is without redress; but is he remediless in

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the event of its destruction by fires resulting from the negligence of the company, either as respects the conduct of its trains or the control and management of its track and right of way? The legislature, in legalizing the use of engines running through the country, scattering fire and cinders on all sides, over lands in the vicinity of the road, certainly did not intend to impose any additional burdens or duties upon the owners of such lands. They are subject only to such risks as are necessarily incidental to the proper and legitimate operation of the road by those having charge of it. Any other rule would impose upon property holders near the line of a railroad the necessity of removing their grain, hay and whatever is of a combustible nature, to some distant point, not infrequently of changing the whole course of husbandry—of incurring enormous expenses, and of exercising ceaseless vigilance in order that the company may negligently permit the accumulation of dangerously inflammable matter upon its own lands, liable at any moment to be ignited by fires from its own locomotives. It has been well said that fire is an extremely dangerous element, even when employed for a lawful purpose. The exercise of due care and diligence is imposed upon him who uses it and sets it in motion for his own advantage, and not upon him who is merely passive, confining himself to lawful employment and business in the conduct of his own affairs. There are some few cases holding a contrary doctrine, but the great weight of authority is in conformity with the views here expressed. I refer particularly to an exhaustive discussion of the whole subject by Chief Justice DIXON in *Kellogg v. Chicago and Northwestern Railway Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69; and also to a very able opinion of Judge HAYMOND in *Snyder v. P. C. & St. L. Railway Co.*, 11 W. Va. 14; see *Salmon v. Del., Lack. & West. Railroad Co.*, 38 N. J. 5; s. c., 20 Am. Rep. 356; and the same case reported in 39 N. J. 299; s. c., 23 Am. Rep. 214.

The rule may of course be subjected to modifications to be applied to the circumstances of particular cases. It will be sufficient to consider them as they may hereafter arise. There is nothing in the present case to warrant a departure from a doctrine so well supported by authority, and so just and reasonable in itself. I am therefore of opinion that the judgment of the Circuit Court is right, and must be affirmed.

Judgment affirmed.

PRUNER V. PENDLETON.

(75 Va. 516.)

Nuisance — slaughter-house.

A slaughter-house in a town is not *per se* a nuisance,* but may be enjoined when shown to be unavoidably offensive and injurious.

BILL for injunction against using a slaughter-house. The opinion states the facts. The complainant had judgment below.

F. S. Blair and R. H. Richardson, for appellants.

J. H. Gilmore, for appellees.

BURKS, J. The court is of opinion that there is no error in the orders and decrees appealed from.

Slaughter-houses in a city or town were once reckoned by the courts as nuisances *per se*, and they are still so classed in the opinion of the court in *Green v. Lake*, 54 Miss. 540; S. C., 28 Am. Rep. 378, decided as late as 1877, and much relied on by the learned counsel of the appellants; but it is said in a late work of merit, that the wonderful improvements wrought by science in all departments of life has shown that this position cannot now be upheld in reference to any trade, and that slaughter-houses are now regarded merely as *prima facie* nuisances. Woods on Nuis., §§ 503, 504, and cases there cited. When erected and used in a city or town, the remark of Chancellor WALWORTH is the most that can be said in their defense, that "it is perhaps possible to carry on the business of slaughtering cattle to a limited extent, in such a manner as not to be a nuisance." *Catlin v. Valentine*, 9 Pai. 575, 576.

From the doctrine that such a trade or business in a city or town or place thickly populated is *prima facie* a nuisance, it results that the burden is upon those who engage in the business, when the complaint is made, to show that it is not a nuisance — that it does not produce that which is offensive to the senses and which renders the enjoyment of life and property in the neighborhood uncomfortable.

The slaughter-house of the appellants is within the corporate limits of the town of Marion, near the residences of many citizens,

* See *Minks v. Hofeman* (87 Ill. 450), 29 Am. Rep. 63; *Woodyear v. Schaeffer auct.*, 412.

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and within full view of and only 130 feet from the dwelling-house of Mrs. Pendleton, in whose behalf principally the bill was filed by her son and trustee W. C. Pendleton.

Laying out of view the personal grievances of W. C. Pendleton, the complaint of Mrs. Pendleton in substance is that the groans and cries of the animals when being slaughtered, and more especially the offensive odors which issue from the slaughter-house and its surroundings, render it impossible to live in her house with any sort of comfort—that the slaughter-house is an intolerable nuisance and inflicts upon her an irreparable injury.

All this the appellants deny and introduce many witnesses to substantiate their defense. We do not propose to discuss this testimony, but two general observations may be made respecting it. 1. Many of the witnesses do not live in the immediate vicinity of the slaughter-house, and none of them (except perhaps one or two) as near as the residence of Mrs. Pendleton, and some of them only occasionally visited the slaughter-house. 2. The testimony (or the most of it), in its relation to the grounds of complaint, is negative in its character, and not necessarily inconsistent with the testimony on behalf of the appellee.

On the other hand, the witnesses for Mrs. Pendleton speak positively of matters that came directly under their personal observation—facts within their own knowledge—facts which constitute the nuisance charged—and they had the best opportunity to be informed and to know whereof they spoke.

It is established by the proof, and indeed conceded, that Mrs. Pendleton is a lady of truth and high respectability. In her deposition, speaking of the slaughter-house, she says: "It is offensive. Sometimes it is a great deal worse than at others. I can hear the fluttering and groaning of the animals very plainly. I can smell the offensive matter very distinctly in my room when the window is up. In hot weather it is so offensive that I cannot stay in there with the windows up. I could not stay in there at night without the windows being down in hot weather." In these statements she is fully corroborated by a number of witnesses, some of them inmates of the house, and others visitors in her family. It is not necessary to repeat what they say. It is to be noted that the appellants examined no witness who was or had been an inmate of that house, or who had been in the habit of visiting there, and all who resided or had resided in the house or who were visitors there, and

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were examined by the appellee, concur in the statement of Mrs. Pendleton as to the odors and generally as to the noise in the slaughtering. And it is further shown that the odors continued after the injunction was granted as before, notwithstanding all the efforts of the appellants to guard against it, and the learned judge, in the last order he made in the cause, after the lapse of nearly two months from the granting of the injunction, declared that the appellants "had used every effort practicable to prevent inconvenience to the plaintiff from the use of the slaughter-house in controversy, but that disagreeable odors, unpleasant sights and noises are unavoidably incident to the use of said slaughter-house."

In this view, upon the evidence in the record, we concur, and are of opinion that the appellee is entitled to the relief prayed and granted.

[Omitting minor considerations.]

Upon the whole matter we are of opinion that the decree should be affirmed.

Decree affirmed.

FIRST NATIONAL BANK OF HARRISONBURG V. PAUL

(75 Va. 594.)

Deed — acknowledgment — evidence to supply defect in certificate.

Parol evidence is inadmissible to supply a defect in the certificate of acknowledgment of a deed by a married woman.

DOWER. The opinion states the point. The complainant had judgment below.

John E. Roller, for appellant.

G. W. Berlin, for appellee.

STAPLES, J. [Omitting a minor question.] The question then is, is it competent to show by parol testimony that the privy examination of the wife was regularly taken in the form prescribed by the statute; but that the clerk through accident, inadvertence, or mistake, has omitted some of the material statements required to be

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set forth in the certificate of privy examination. This question can be best answered by the provisions of our statute on the subject, found in chapter 117, Code 1873. It is there enacted that the wife must be examined privily and apart from her husband; the writing must be fully explained to her; she must declare it to be her act; that she executed the deed willingly, and does not wish to retract it. The clerk or justice, as the case may be, is then required to certify such privy examination, declaration, or acknowledgment on or annexed to the deed, and the certificate must be admitted to record at the time of recording the deed. The statute then proceeds: "When the privy examination, acknowledgment, and declaration of a married woman shall have been taken and certified as aforesaid, and the writing to which such certificate is annexed shall have been delivered to the proper clerk, and admitted to record, as to the husband as well as the wife, such writing shall operate to convey from the wife her right of dower in the real estate embraced therein."

It will thus be seen that the statute prescribes the necessary steps to be taken preparatory to a valid relinquishment of the claim for dower.

The certificate must set forth her declaration and acknowledgment as prescribed by the statute; it must be on or annexed to the deed, it must be admitted to record along with the deed, and when all these requirements shall have been complied with, and not till then, the writing operates to convey from the wife her right of dower.

The object of this statute is to provide a substitute for the proceeding by fine in England, which was never in force in Virginia, whereby the rights of the *feme* on the one hand might be carefully guarded, and a sure, indefeasible title, and an unquestionable transfer of her right secured on the other.

As was said by Judge TUCKER, *Harkins v. Forsyth*, 11 Leigh, 301, "The validity of the deed is made to depend, not upon the truth of the certificate, but upon its existence, and its delivery to the clerk." It is the authentic and sole medium of proving that the *feme covert* has acknowledged the deed with all the solemnities required by the statute. In *Hairston v. Randolphs*, 12 Leigh, 459, Judge ALLEN said: "The certificate must show that everything is done which is required by law to be done." And this upon the principle that where the law authorizes any one to make

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an inquiry of a judicial nature, and to register the proceeding, the written instrument so constructed is the only legitimate medium to prove the result. 3 Stark. on Ev. 1043, 1044.

And although the numerous Virginia decisions on the subject of the wife's relinquishment of dower do not determine this precise question, no one can read these decisions without perceiving that all the reasoning of the judges is against the admission of parol testimony to prove or disprove the privy examination, or in any manner to affect the certificate of such examination.

Fortunately we are not without express authority in other States upon the point. The researches of the learned counsel for the appellee have supplied us with a multitude of cases which speak with one voice, and leave no room for doubt on the subject.

In *Smith v. Ward*, 2 Root, 378, 1 Am. Dec. 86, notes, the court says: "Again parol evidence will not be received to support a certificate where it is palpably defective by omitting to state some fact the law requires."

In *Watson v. Bailey*, 1 Binny, 470, it was held that where the certificate omitted to show a voluntary examination, parol declarations of the wife could not be omitted to supply the defect.

In *Jourdan v. Jourdan*, 9 S. & R., 11 Am. Dec. 724, TILGHMAN, C. J., declares the principle now firmly established is, that the requisites of the act of assembly by which the mode of conveyance by *femes covert* is prescribed must appear to have been substantially complied with upon the face of the certificate made by the magistrate by whom the acknowledgment was taken; and he emphatically declares that parol evidence of the magistrate himself is inadmissible for the purpose of supplying the defects in the certificate. In *Elliott v. Peirsol*, decided by the Supreme Court of the United States, and reported in 1 Peters, 328, the original certificate of the clerk was radically defective. Ten years afterward the same clerk amended his certificate, which showed a compliance with the statute relating to the privy examination of the wife. The decision of the court turned upon the construction of the Kentucky statutes, which are taken from ours, and it was held that the privy examination and acknowledgment of a deed by a married woman, so as to pass her estate, cannot be legally proved by parol testimony; that the authority of the clerk to make a record of the certificate is *functus officio* so soon as the record is made; and that he has no power thereafter to make another or

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amended certificate. The court in this connection uses the following language:

"What the law requires to be done, and appear of record can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact or not; if there be no record of the privy examination—for by the express provisions of the law it is not the fact of privy examinations merely—but the recording of the fact which makes the deed effectual to pass the estate of a *feme covert*."

It would seem therefore to be very clear that parol testimony is inadmissible to supply the absence of an entire certificate, or defects in an existing certificate.

The same rule of exclusion necessarily applies in both cases. The citation of authorities in support of this doctrine may be multiplied almost without number, and in the absence of all authority upon principle, it would seem to be very clear.

We are therefore of opinion there is no error in the decision of the Circuit Court, and that decision must be affirmed.

Judgment affirmed.

ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY V.
ALEXANDRIA AND WASHINGTON RAILROAD COMPANY.

(75 Va. 780.)

Eminent domain — statute — construction — "rights and franchises."

The taking and condemnation by a railroad company of part of the road-bed of another company is an "interference with the rights and franchises" of such other company.

One railway company has no right, without express statutory authority, to acquire for its own uses land already acquired by another railroad company. (*See note, p. 748.*)

THE opinion states the point.

F. L. Smith, for appellant.

H. O. Clayton, F. Miller and E. Hunton, for appellee.

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ANDERSON, J. The Alexandria and Washington Railroad Company was chartered in February, 1854, for the purpose of constructing and operating a railroad between the cities of Alexandria and Washington. It had under its charter acquired title in fee to such lands as were suitable and necessary for the purposes for which it was incorporated, in the mode prescribed by statute, and had laid out its road and constructed its road-bed on the lands it had so acquired, and had laid its track, and was running its train thereon, when the Alexandria and Fredericksburg Railway Company, having been authorized by act of assembly, approved June 4, 1870, to extend its line of road from the city of Alexandria to a point on the Potomac, opposite the city of Washington, caused the track of their road to be laid upon the road-bed aforesaid of the Alexandria and Washington Railroad Company, appropriating the west eighteen and one-half feet of the same to its use. This strip of land constituting a part of the Alexandria and Washington company's road-bed, was taken from said company by the Alexandria and Fredericksburg Railway Company, and condemned for its use by the judgment of the County Court of Alexandria county.

[Omitting a question of jurisdiction.]

The Alexandria and Fredericksburg Railway Company are duly empowered by the general law to take the lands of private parties for the use of their said road; the legislature, having decided that it will be for the public utility, authorizes the company to take such lands as are needed for the purpose. And the law invests the company with title thereto in fee simple, upon the payment of the compensation determined on, subject however to certain restrictions and limitations in both the general law, and in the special act of the legislature, *supra*, under which alone it had any authority to construct said road. I need only consider, in this case, the restrictions contained in the special act aforesaid. After giving the authority to construct the road the act contains a restriction and limitation of its powers in the following words :

“ Provided, that in the extension of the said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg railway from crossing any such railroad.”

The said company took a strip of eighteen and one-half feet of

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the road-bed of the Alexandria and Washington Railroad Company, extending the whole length of the road, amounting to eight acres and twenty-five perches, which had been appropriated to it, and the title to which in fee was vested in it by the law under its charter, and which it held under its chartered rights and franchises.

It is contended by the counsel for the appellant in their able argument that this was no interference with the rights and franchises of said company. That it was only the appropriation of land of said company, as of individuals, and not its franchises, and that rights in this clause and franchises mean the same thing. And in support of their claim they cite the language of President Tucker in *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh, 75 (36 Am. Dec. 374), in which he held that a franchise was an incorporeal hereditament, consequently they say it cannot be land. That is true. But as was said by Judge TUCKER: "It is a franchise to be a corporation with power to sue and be sued, and to hold property as a corporate body." The property taken by the Alexandria and Fredericksburg Railway Company was held by the Alexandria and Washington Railroad Company as a corporate body; and according to Judge TUCKER in the said opinion, is held as a corporate body by virtue of its franchise. And can it be said that it was no interference with the company's franchise to take the land which it held under it? I cannot think so. It seems to me that it was a very direct and serious interference with its franchise. The language of the restriction is very strong: "Shall in no way interfere"—and that the language might not be misunderstood the restriction is expressed with greater fullness and force, "Shall in no way interfere with the chartered rights or franchises of any railroad," etc. It is very clear, it seems to me, that to take the lands of the company upon which its railroad bed was constructed, for the length of the road, or a part of them, which it held under its chartered rights and franchises, was such an interference as is expressly prohibited by said clause of the act, and this, I think, more plainly appears from the latter part of the clause, which makes a saving in favor of the Alexandria and Fredericksburg company, that the language shall not be construed to prevent that company from crossing such road. It implies that without this qualification the legislature apprehended that the proviso might even prevent its crossing such road.

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It must be remembered that there are powers exercised by a corporation to appropriate land for its corporate purposes. And Judge COOLEY says: "There is no rule more familiar or better settled than this, that grants of corporate powers being in derogation of common right are to be strictly construed; and this is specially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property." 660 p. top; 530 marg.

If the foregoing views are correct, and I think they are, the County Court of Alexandria has no delegated authority to exercise the right of eminent domain under the statute in such cases, and consequently had no jurisdiction to adjudicate the question whether the land should be taken from one company and given to another company, and upon this ground said judgment of the County Court was *coram non judice*, and consequently null and void. It vested no right in the Alexandria and Fredericksburg company, and can form no barrier or impediment to the consideration and decision of this case, just as if there had been no such judgment rendered. For the court having no jurisdiction of the subject matter there is no judgment in the way, and the case turns upon the question whether the Alexandria and Fredericksburg company had any authority of law to interfere with the chartered rights and franchises of the Alexandria and Washington company by appropriating to itself its road-bed, either in whole or in part. We have seen that it had no such right, and upon this view of the case the decree of the Circuit Court, I think, was clearly right, and ought to be affirmed.

But if contrary to my understanding of the statute, it does delegate to the County Courts in such cases authority to exercise the right of eminent domain, and invests them with jurisdiction in general to determine what lands shall be condemned for the railroad company, and what shall not be, and to invest the title in fee simple to such as they condemn—a power and jurisdiction which, I think, the statute may be searched in vain to find conferred on the County Courts in railroad cases—it still remains a question, was the County Court of Alexandria invested with jurisdiction in this case to take from the Alexandria and Washington company its road-bed, in whole or in part, which it held in fee under its

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charter, devoted to the public use, and give it to the Alexandria and Fredericksburg company for another public use?

It is undoubtedly true (it was said in *Proprietors of Locks & Canals v. City of Lowell*, 7 Gray, 226), that land or other property which has in conformity with the provisions of the Constitution been devoted to the public use, may afterward in like manner be again taken and appropriated to the public service, under a subsequent statute duly enacted, if such purpose is expressly, or by unavoidable implication authorized by its provisions. * * * But if such an appropriation is once made, the property cannot afterward be interfered with, or the right of holding and enjoying it in that definite manner be interrupted or disturbed, except under the provisions of some subsequent statute, expressly or by necessary implication, authorizing its subjection to public service in another and different manner.

In the *Housatonic Railroad Company v. Lee and Hudson Railroad Co.*, 118 Mass. 391, the court held that a charter to build and maintain a railroad between certain points, without describing its course and direction, * * * does not, *prima facie*, give any power to lay out the road over land already devoted to and within the recorded location of another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication. Citing *Springfield v. Connecticut River Railroad*, 4 Cush. 72. "A general authority to lay out a railroad does not authorize a location over land already devoted to another public use." Mills on Em. Dom., § 46. Numerous other cases are cited by appellee's counsel in support of this doctrine, which I need only refer to. *Boston & L. R. Co. v. Railroad Co.*, 2 Gray, 35-37; *Hikok v. Hine*, 23 Ohio St. 523; s. c., 13 Am. Rep. 255; *In re Buffalo*, 68 N. Y. 171; *Mill. & St. R. Co. v. Faribault*, 23 Min. 169; *Contracosta R. Co. v. Mass.*, 23 Cal. 325; *San Francisco & A. W. Co. v. Water Co.*, 36 id. 639; *Barber v. Andover*, 8 N. H. 398; *West Boston Bridge v. County Com'rs*, 10 Pick. 270; *In re Boston & A. R. Co.*, 53 N. Y. 574.

The appropriation of private property for the use of a railroad by a railroad company is by authority of the act of the legislature, which authorized the construction of the road, which Cooley says, *supra*, must be held for this purpose the law of the land. And the

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County Court, it seems to me, could have no jurisdiction, in the face of such legislative action, to divert it from such use, and appropriate it to another, unless authorized by a subsequent act of the legislature in express terms, or by necessary implication, and to this result the authorities before cited lead. The power being extraordinary and against common right must be construed strictly.

The omission of the legislature to embody these restrictions in the statute, in the revision of 1849, as recommended by the revisors, I do not think can be construed as a legislative construction of the law in conflict with what seems to be the whole current of judicial decision. But I deem it unnecessary to pursue this inquiry further.

The special act of the legislature which authorized the Fredericksburg and Alexandria company to construct this road, exempted, as I have endeavored to show, the property of the Alexandria and Washington company which the Fredericksburg and Alexandria company, in laying out its road appropriated to itself from condemnation by that company, it being an interference with the chartered rights and franchises of the other company. And by virtue of that exemption it could not be taken by the Alexandria and Fredericksburg company, and it was not within the jurisdiction of any court to condemn it, because by that exemption it was not subject to the right of eminent domain. Upon this aspect of the case I will content myself with a reference to the able opinion of the judge of the Circuit Court. Whilst I have confidence in the correctness of the ground first taken in this opinion, I am inclined to the opinion that upon this view also the County Court exceeded its jurisdiction in its judgment of condemnation, and that consequently its said judgment may be attacked collaterally.

Upon the whole I am of opinion to affirm the decree of the Circuit Court.

Decree affirmed.

STAPLES and BURKS, JJ., concurred in the result, and CHRISTIAN, J., dissented.

NOTE BY THE REPORTER. — See *Grand Rapids, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 35 Mich. 265; s. C., 14 Am. Rep. 545, and note, 551.

In *Milwaukee & St. Paul Ry. Co. v. City of Faribault*, 23 Minn. 167, it was held that under a general power to lay out and open streets a city has no authority to open streets through the depot grounds of a railroad company, acquired under authority of a legislative grant, in such manner as to destroy or essentially impair the value of the company's easement therein. The court said: "The rule is well settled, that in cases of this kind,

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the legislative intent must be made to appear by express words or by necessary implication. *Inhabitants of Springfield v. Connecticut River R. Co.*, 4 Cush. 68; *City of Bridgeport v. New York & New Haven R. Co.*, 36 Conn. 255; s. c., 4 Am. Rep. 66; *Matter of Boston & Albany R. Co.*, 53 N. Y. 574; and such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity. *Hickok v. Hine*, 38 Ohio St. 533; s. c., 13 Am. Rep. 266. * * *

"It is claimed by defendant that the city council, in this case, was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the necessity and expediency of laying out highways is exclusively a legislative, and not a judicial, question. This is undoubtedly a correct rule as applied to the legislature itself, and also to a municipal body when acting within the conceded limits of its delegated powers. But when as in this case, the jurisdiction of the inferior tribunal over the particular subject-matter depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive upon the courts."

So in *Matter of Boston & Albany R. Co.*, 53 N. Y. 574, it was held that in the absence of express authority or necessary implication, a railroad company could not take lands held by a municipal corporation in trust for the use of the public as a park or common.

In *Matter of City of Buffalo*, 68 N. Y. 167, it was held, under similar circumstances, that a city empowered to take land for canals, basins, slips, etc., could not take lands of a railroad company, used for its yard, depot, etc. The court, by FOLGER, J., said: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject the lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner."

In *Central City R. Co. v. Fort Clark Ry. Co.*, 51 Ill. 523, it was held that a horse railway company cannot take part of a railway of another like company. The court said: "We do not wish to be understood as holding, one railroad company may not condemn the road of another, under a power granted by the legislature so to do — on this we express no opinion; but we do insist, an established railroad being a public institution, and useful only in its entirety, cannot be cut up and sectionized by a competing road, acting under an ordinance of a city council. Proceedings might be instituted perhaps to condemn the entire road and franchise, and thus pass it over as an entirety to the competing road; but that one competing road can bisect it here, and another there, at a different point, taking to themselves the most productive portions of the road, and leaving an unproductive fragment to the first proprietors, we do not believe, and have seen no authority giving countenance to a doctrine, in its operation so unjust and at war with just principles. And we are at a loss to understand how this part of appellants' franchise, occupying the most populous and business part of the city, can be operated jointly by their competitors. But whether it can or not be safely done, it is unimportant to inquire, as in our opinion, one competing street railroad company cannot take, by the exercise of the right of eminent domain, a fragment of a competing road in successful operation, and the most valuable part of it, and thus destroy, in effect and usefulness and value, the remaining fragments."

LAW V. COMMONWEALTH.

(75 Va. 885.)

Criminal law — infancy — capacity.

A male infant, about twelve years old, put his hand over the mouth of a girl ten years old, while his elder brother attempted to commit a rape upon her. *Held*, not sufficient to warrant his conviction as principal in the second degree.*

CONVICTION of aiding rape. The opinion states the case.

O. G. Clay, for plaintiff in error.

Attorney-General, for Commonwealth.

STAPLES, J. The accused was indicted in the County Court of Franklin as principal in the second degree, for aiding and abetting one John Henry Law in committing the crime of rape. Upon the trial, the Commonwealth proved the offense, and that John H. Law, the principal in the first degree, had been convicted and sentenced to three years confinement in the penitentiary. It was further proved that the accused, at the time of the commission of the offense, was of the age of eleven years and eleven months. After the testimony was concluded his counsel asked the court to give the jury the following instructions :

“The court instructs the jury that if they believe, from the evidence, that Nathaniel Thomas Law was under fourteen years of age at the time of the commission of the crime charged, and did not have the capacity to commit it, they must acquit him.”

“The court further instructs the jury that if they believe, from the evidence, that John Henry Law, the principal in the first degree, was not guilty of rape, but only of an attempt to commit rape, they cannot find Nathaniel Thomas Law guilty of principal in the second degree ; provided they believe he was under the age of fourteen, but must acquit him.”

These instructions were refused by the court, and the accused excepted. Thereupon the jury found him guilty, and fixed his term of confinement in the penitentiary at three years. He then submitted a motion for a new trial upon the ground that the verdict was contrary to the law and the evidence, which motion

* See *Angelo v. People* (36 Ill. 209), 36 Am. Rep. 132.

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was overruled and judgment rendered upon the verdict. To that judgment the accused applied for a writ of error to the Circuit Court, which was refused. He then applied for and obtained a writ of error from one of the judges of this court.

The first question to be considered is whether the County Court erred in refusing the instructions asked for by the accused. The theory of these instructions, so far as we can understand them, is that John Henry Law, the principal in the first degree, was convicted of a mere attempt at rape, and as the accused, by reason of his tender years, was incapable either of the crime of rape or an attempt at its commission, he cannot be convicted of either offense — as principal in the first or principal in the second degree.

It has long been settled in England that an infant under fourteen years of age, by reason of his supposed impotency, cannot be guilty of the crime of rape or of an attempt at its commission, although he may be convicted of an assault with an intent to commit the offense. This doctrine of the English courts has never been fully recognized in this country. In some of the States it has been expressly repudiated. In Virginia it does not appear to have been passed upon by any court of the last resort. The purposes of this case do not require that it be considered now ; for here the accused is charged simply as principal in the second degree, with aiding and assisting another in the perpetration of the crime. And although the infant may himself be incapable of committing the specific offense, yet if of sufficient natural discretion, he may be present, aiding and assisting another in its perpetration. The rule is thus laid down in 2 Arch. Crim. Prac. and Plead. 156 : “For though in other felonies, *malitia supplet aetatem*, yet as to this particular species of felony (rape) the law supposes an imbecility of body as well as of mind. But as this doctrine is founded upon the ground of impotency, rather than want of discretion, a boy under fourteen who aids and assists another person in the commission of the offense, is not the less a principal in the second degree, if it appear under all the circumstances that he had a mischievous discretion.” And this is the result of all the authorities, without an exception. 1 Whart. C. Law, § 61 ; Ros. C. Ev., 1 Hale P. C., 630.

[Minor point omitted.]

It is apparent therefore that the County Court committed no error in refusing to give the instructions asked for by the counsel for the accused.

We are next to inquire whether the court erred in refusing to set aside the verdict and award a new trial, upon the ground that the finding of the jury was against the law and the evidence. The certificate given by the presiding judge is so very meager, it is difficult to believe it contains all the facts proven. Inasmuch however as it purports so to do, we must so treat it in this case. From this certificate it appears that the accused was eleven years and eleven months old when the offense was committed. It was proved that he was a boy of average discretion of his age, and this was all that was proved on the subject of his capacity and intelligence. The question is whether upon this proof he was properly convicted. The law with respect to the responsibility of infants for crime is well settled. An infant under seven years of age is conclusively presumed to be incapable of crime, and no evidence can be received to rebut the presumption. Between seven and fourteen he is within the age of discretion, but still presumed *doli incapax*. This however is a mere *prima facie* presumption which may be rebutted by evidence of capacity sufficient to understand the nature of the act and its consequences. The presumption of incapacity is very strong at seven years of age, but it decreases with the progress of years. The first point of inquiry is whether the accused was able to distinguish between right and wrong, to understand the nature of the crime he was committing, and that it was deserving severe punishment. It is not intended to assert that the capacity of the offender must be proved by the direct testimony of witnesses. It may be inferred from the facts and circumstances of the particular case. The nature of the crime and the conduct of the perpetrator may of themselves present the most pregnant evidence that he knew the nature of the act and its consequences.

A case is mentioned in Hale's Pleas of the Crown of a boy between eight and nine years of age, who was executed for arson—it appearing he was actuated by malice and revenge, and had perpetrated the offense with craft and cunning. 1 Hale P. C. Another case is mentioned of an infant of the age of ten years, who killed his companion and hid himself. He was hanged upon the ground that it appeared by his hiding he could distinguish between good and evil and *malitia supplet ætatem*. There are other cases of a similar kind in the books referred to, as illustrative of the rule that the fact of guilty knowledge may be inferred from the circumstances of the particular case. 1 Whart., § 67, and notes; 1 Arch. C. Pl., p. 10, and notes.

In the case before us, as has been already stated, the only direct proof of capacity is that the accused was a boy of average capacity for his age. If it be meant by this that his capacity was about equal to that of other boys of the same age, the proof amounts to nothing. For the rule, which presupposes the want of requisite intelligence in a child under fourteen, is founded upon what is considered to be the average capacity of that age. It is therefore not sufficient to prove the offender possessed the amount of intelligence which other children of the like age possessed. The Commonwealth must go further, and prove that the offender in the particular case understood the nature of his act and its consequences, and especially so where he is under twelve years of age.

There is one fact certified by the court which tends, in some degree, to show that the accused was afraid of detection and endeavored to guard against it. It is that he placed his hand over the mouth of the female with a view, no doubt, of preventing her from crying out. This is certainly a circumstance to be considered; but of itself it is not sufficient in this case to warrant a conviction. The principal offender, no doubt the real contriver of the outrage, was the elder brother of the accused. It may be—it is highly probable—that the latter was prompted in all that he did by the directions or persuasion of his more matured companion. At all events it is very clear that this question of guilty knowledge, on the part of the accused, did not receive on the trial that attention and investigation to which it was entitled. In the natural abhorrence of the crime, the attention of the jury was probably diverted from a vital matter for their consideration. The confinement of a child of twelve years of age in the penitentiary is at best a lamentable occurrence. Of course it may be done, and rightfully done, for as has been justly said, there are many crimes of a most heinous nature which children are very capable of committing, and which they may, under some circumstances, be under strong temptation to commit, and it would be of very dangerous consequence were it thought that they may perpetrate atrocious offenses with impunity. But it must not be forgotten that the evidence of malice, which is to supply age, must be clear and strong beyond all doubt and contradiction. The evidence is wanting in this case, and upon that ground only the verdict must be set aside and a new trial had in conformity with the views here expressed.

Judgment reversed.

CASES

OF THE

SUPREME COURT

OF

WISCONSIN.

WILCOX v. MATTESON.

(38 Wis. 23.)

Gift — causa mortis — delivery.

While on his death-bed, and about three hours before his death, W. told the attending nurse that his pocket book was "under the bed, just under his shoulders," and requested her to "take it and give it to his wife when she came," with the money and papers contained in it. Several hours after his death the nurse for the first time took the pocket-book, and gave it to another person, with directions to give it to the widow if she came or send it to her if she did not come. *Held*, not a valid gift.*

ACTION on a promissory note. The head-note and opinion state the facts. The plaintiff had judgment below.

Harlow Pease, for appellant.

R. B. Kirkland, and *I. W. & G. W. Bird*, and oral argument by *Wm. H. Rogers*, for respondent.

* See *Carradine v. Carradine* (38 Miss. 236), 38 Am. Rep. 224; *Conser v. Snowden* (34 Md. 175), 39 Am. Rep. 368.

TAYLOR, J. Upon this appeal the defendant alleges as error, that the evidence produced on the trial shows affirmatively that the note upon which the action was brought was not owned by the plaintiff, but belonged to the estate of her deceased husband, and that the evidence offered for the purpose of showing a gift of the same by the deceased to the plaintiff during his life-time, failed to show such gift. We are constrained to agree with the learned counsel for the appellant that there is no evidence in the case which shows any delivery of the possession of the pocket-book and its contents during the life of the husband to the plaintiff, or to any other person, for her use. If we construe the language of the deceased most favorably for the plaintiff, and that his request to the nurse Edgar was that she should immediately, and before his death, take the pocket-book into her possession and keep it for and deliver it to his wife when she came, as her property, still the evidence fails to show that the possession passed from the deceased to the nurse for the use of the plaintiff until after his death. The nurse states that she did nothing, after the deceased instructed her what to do with the pocket-book, until several hours after his death. Admitting that the nurse might have received the possession of the property for the plaintiff in her absence, and that the actual receipt of it by her, in the life-time of the deceased, would have been effectual to pass the title to the plaintiff, the fact remains that she did not take possession during his life. If this can be upheld as a gift, then it must be upheld on the ground that the possession of the property passed by force of the words of the deceased, expressing a desire that it should pass.

We know of no case where a gift has been upheld when no act has been done tending to change the possession of the property which is the subject of the gift from the donor to the donee. The pocket-book was in the actual possession of the donor at the time when the conversation between him and the nurse took place, and it so remained until his death, without any change in its location, or any attempt to change the same. There is no doubt of the intent of the deceased to give the property to his wife, but there is an entire absence of proof of any act done either by him or by the nurse standing in the place of the wife, which tends to show any surrender of the possession by the husband, or any taking possession thereof by the nurse during the life of the husband. To make a gift perfect, all the cases hold that the possession of the subject of

the gift must pass from the donor to the donee. This has been so decided by this court, and it is therefore unnecessary to resort to the decisions of other courts to sustain our ruling in this case. See *Wilson v. Carpenter*, 17 Wis. 512; *Resch v. Senn*, 28 id. 286. In the first case cited, this court adopted the rule laid down by Chancellor KENT, in his commentaries, as follows: "Delivery in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed."

In the case at bar, the subject of the proposed gift was of such a character that an actual delivery could have been made, but none was made. The possession remained in fact exactly the same after the direction given to the nurse as it was before, and so continued until the death of the donor.

We think the evidence clearly shows that the title to the note remained in the deceased husband at the time of his death, and that the learned judge erred in directing a verdict for the plaintiff.

[Omitting a statutory consideration.]

The judgment of the Circuit Court is reversed, and a new trial ordered.

So ordered.

ROGERS V. ROGERS.

(58 Wis. 26.)

Deed — surrender and destruction — declaration of trust.

Title to land is not reinvested by the surrender of the deed to the grantor and its destruction by him.

A grantee is not affected by a separate declaration of trust, not referred to in the deed nor known to the grantee.

ACTION to establish title to land. The opinion discloses the facts. The defendant had judgment below.

Fish & Dodge, for appellant.

Winslow & Brownson and *J. V. Quarles*, for respondent.

CASSODAY, J. If the father did not intend that the deed should take effect, he should have kept it himself or placed it in the hands of a stranger, and not have delivered it to his son, the grantee. *Lowber v. Connit*, 36 Wis. 176.

In *Hinchliff v. Hinman*, 18 Wis. 130, it was held that "where one has executed a deed of land, and delivered it to the grantee with intent to pass the estate, the legal effect of such delivery will not be altered by the fact that both parties supposed that the deed would not take effect until recorded, and might be revoked at any time before record." To the same effect is *Bogie v. Bogie*, 35 Wis. 659. Here the undisputed evidence clearly shows that the very object of the respondent in delivering the deed was to give it effect. Would the fact that after such delivery the son handed the deed back to the father, who placed it in the package and then handed the package back to the son for deposit, and the subsequent destruction of the same, as claimed by the father, operate as a cancellation of the deed? In *Parker v. Kane*, 4 Wis. 1, it was held that "the cancellation or destruction of a deed of conveyance of lands, by the consent and agreement of parties, does not operate to revest the title in the grantor." To the same effect are *Wilke v. Wilke*, 28 Wis. 296; *Hilmert v. Christian*, 29 id. 104; *Bogie v. Bogie*, 35 id. 659.

In view of these well-settled principles, we must hold that immediately upon the delivery of the deed by the father to the son it became effectual and vested the legal title to the land described in the son. There is no claim that the father ever delivered to the son the alleged declaration of trust, much less that the son ever accepted or undertook to perform such trust, or ever signed any paper agreeing to do so. Assuming that the father, prior to the delivery of the deed, had drawn a declaration of trust, and that the same was in the package at the time of such delivery, and that the son subsequently having access to the package, saw it and knew its contents, as urged by counsel, yet would such facts prevent the legal title from being vested in the son by the delivery of the deed, or operate to divest the title after it was so vested? We are clearly of the opinion that they would not. There is no claim that there was

any declaration of trust in the deed, nor that there was any thing in the deed making any reference to the alleged declaration of trust, or to any other paper. We are unable to find evidence in the case which would authorize us in holding that the relation of trustee and *cestui que trust* was ever assented to by the son, much less created at the time of the delivery of the deed. The Circuit Court seems to have reached the same conclusion in this regard, otherwise judgment would have been entered preserving and making effectual the alleged trust, instead of dismissing the complaint and treating the deed as a nullity. In fact, it is the theory of counsel for the respondent that neither the deed nor the declaration of trust ever went into effect, but that they together were in substance an ineffectual last will and testament, which if they had been effectual, would have been revocable at pleasure. But this theory is sufficiently disposed of by our holding that delivery of the deed was effectual to pass the legal estate to the grantee.

The evidence strongly tends to show that the private and business relations of the father and son were, at the time of the delivery of the deed, and for a long time prior thereto had been, quite intimate and confidential, and that the father had received money of the son which he had failed to repay ; and as the father had become very old, it would seem that he concluded to obviate the making of a will, for which he seemed to have an abhorrence, and convey this land to his son, with the expectation that he would, to a certain extent, become the almoner of his other children ; and we are inclined to believe that the alleged declaration of trust was nothing more than a statement written out by the father for the purpose of leaving the same at his death as a suggestion to the son in that respect, but without intending to make it binding upon him. But subsequently to the delivery, their friendly relations were for some cause interrupted, and hence a different disposition of the land became desirable.

The equity of the complaint is denied. This however is not an action to compel the respondent to convey the land, but merely to quiet the title and restore the evidence of a title already vested in law. In such a case it would seem to be unnecessary to allege and prove that there was a good consideration for the deed which vested the title. *Eiden v. Eiden*, 41 Wis. 460. In the case at bar however we think there was a good consideration for the deed.

By the Court.— In view of the admissions in the complaint, and

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the offer of counsel for the appellant on the argument in this court, we hereby reverse the judgment of the Circuit Court, and remand the cause with direction to enter judgment according to the relief demanded in the complaint, but with and subject to the condition that the defendant shall have the exclusive right to the use and occupancy of the premises described, during the term of his natural life.

Judgment reversed.

KLATT V. CITY OF MILWAUKEE.

(53 WIS. 196.)

Municipal corporation — negligence — highway.

A city let certain street repairs to a contractor. The contractor put up a barrier at the point in question, which remained there at 4 o'clock P. M., but it was removed by some stranger, and about 9 o'clock of the evening of the same day, the plaintiff, in driving at that point was injured by the defective condition of the street. Neither the contractor nor the city knew or had any notice of the removal of the barrier. *Held*, that no action would lie against the city.*

ACTION for personal injuries by negligence. The opinion shows the facts. The plaintiff had judgment below.

J. R. Brigham, city attorney, for appellant.

J. V. V. Platto, for respondent.

ORTON, J. The accident which caused the injury complained of is alleged to have happened by reason of the city not keeping barriers and lights in the street where it occurred (which was then being paved and thereby rendered unsafe for travel), which would have prevented it. The duty of the city to protect the travelling public from injury liable to happen in consequence of street improvements of this character is the vital principle of this case; and before applying it to the facts and findings, it is necessary to determine the nature of this duty of the city, and the extent and measure of the responsibility involved. When this duty is not

* See *Mayor v. O'Donnell*, (53 Md. 110), 36 Am. Rep. 395.

directly and specifically imposed by law, it arises by necessary implication from the primary duty, which is so imposed upon the city, to keep its streets which have been opened to public use, all the time fit and safe for such use. The right and duty to make improvements of streets by grading, paving, etc., in order to make and keep them in such fit and safe condition, do not constitute an exception to such primary duty, but are necessary to its best performance, and arise from it and are consistent with it and subsidiary to it, although for the time being, and while such improvement is being made, such streets are rendered less or wholly unfit or unsafe for such public use. The duty in question, to protect the public by suitable precautions against danger and damage while so improving the streets, arises from, and is connected with the right and duty to improve, and both are included in the first or primary duty imposed by law to keep the streets in repair and all the time in a condition safe to the travelling public, as well during the progress of improvements as at all other times. This must be so, else there is no liability for neglect of the duty in question, at least in this State where the liability and right of action exist by statute, or not at all. The duty to repair and to keep in repair is coupled with the duty to protect the public against accidents while the streets are out of repair or while they are being repaired, and they must be kept in a safe condition, or the public must be protected from accident in some proper way while they are unsafe. This view is sanctioned by many cases in this court and elsewhere.

In the leading case of *City of Milwaukee v. Davis*, 6 Wis. 377, it is said: "The leaving of the street in that impassable condition on the night in question, without lights, fence or guard, or other token, * * * is in fact the *gravamen* of the complaint.

In *Seward v. Town of Milford*, 21 Wis. 485, an instruction was approved, "that if the town had not had time to repair the road, it should have put up and kept up proper guards at that place to notify and prevent travellers from going on the dangerous track."

In *Ward v. Town of Jefferson*, 24 Wis. 342, the two duties are coupled together, in the language: "And to have put the road in repair, or by other means to have guarded against and prevented the injury."

In *Hammond v. Town of Mukwa*, 40 Wis. 35, the present chief justice said: "And we are clear that the town is primarily liable when it fails to keep such highway safe for public travel, or does

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not use proper precautions to warn travellers of the dangerous condition of the highway."

It is said in *Shearman & Redfield on Negligence*, § 399, citing several authorities: "Pending the work of rebuilding, if the public is put upon its guard, the town will be excused for the defective condition of the highway."

These references are quite sufficient to show by authority, what is apparent in reason, that in the very nature of the duty to keep highways in repair and safe for travel is included the duty to use proper precautions against accident while they are unsafe and out of repair, and that the two duties, if they may be nominally separated, are of the same nature and obligation, and liability for their non-performance rests upon the same degree of negligence. It follows therefore that if the city could not be held to a strict and absolute, but only to a reasonable performance of the duty to keep its streets in repair and safe for travel, and in respect thereto only to the exercise of ordinary care and prudence, and would not be held liable for an injury occasioned by their being out of repair and unsafe, without actual or presumptive notice that they are in such condition, it should be held to no stricter performance of the duty to protect the public by suitable precautions from injury while the streets are out of repair and unsafe for travel, and in respect thereto should be held to the exercise of the same degree of care and prudence. It is too well established to require the citation of authorities, that if a street should suddenly and without warning to or fault of the city, come by any means into a condition dangerous to travel, the city would not be liable for damages occasioned thereby, without actual notice, or notice implied or presumed by lapse of time, of its condition, and until after a reasonable time for repairing it. By the same rule, when a street being improved is made safe, so far as the public are concerned, by barriers or other proper precautions, if suddenly and without warning to or fault of the city, it becomes unsafe by the removal of such barriers or other precautions by any means, the city should have the same notice.

In *Shearman & Redfield*, § 376, it is said: "During the progress of the work of altering or repairing a highway, ordinary care must be used to prevent injuries to passengers therefrom." In *Koster v. City of Ottumwa*, 34 Iowa, 41, an excavation in the sidewalk, into which the plaintiff fell, had been made and guarded in a certain manner by a builder; and on the trial a witness was asked, sub-

stantially, whether this excavation was not guarded in the customary manner among builders. The evidence was held improper, and the Supreme Court, in affirming the ruling say: "The point in issue was as to whether the defendant had been negligent in fact. If the custom in that city had been to do more in the way of barricading than ordinary care and prudence required, the defendant nevertheless would not have been liable if it had done only what ordinary care and prudence required. It must exercise ordinary care. Custom will not require it to do more, nor excuse it for doing less."

We think that we have sufficiently shown that the liability of the city for not properly guarding a street made dangerous to travellers by works of improvement, so as to prevent accidents thereon, as an implied liability arising from its liability imposed by the statute for not keeping it in a condition of repair and safety, is not an absolute liability, but depending upon the want of ordinary care and prudence. But in this case it is claimed by the learned counsel of the respondent, that the charter (section 11, sub-ch. V of ch. 184, Laws of 1874), requiring the city to have inserted in contracts for street improvements a stipulation, in substance, that the contractor "shall put up and maintain such barriers and lights as will effectually prevent the happening of any accident," imposes upon the city the absolute duty of having such barriers and lights put up and maintained, which must be strictly performed. Whether this is so or not it is unnecessary in this case to decide; for one of the findings of the jury is, that a barrier of a certain kind had been put up across the dangerous street on Saturday night before the accident occurred, and there is no finding that it was insufficient to have prevented the accident if it had remained until the time of its occurrence. When this duty has been performed and a sufficient barrier has been put up, as required by law, the absolute liability, if there is any in such a case, ceases, and the city is only bound to use common care and diligence in maintaining it. If such sufficient barrier is afterward removed or thrown down by a stranger, or from any cause, without the knowledge or fault of the city authorities, and they have no actual notice that it is so removed or thrown down, and a sufficient time has not elapsed, under the circumstances, to raise a presumption that they had notice thereof before the accident, the city is not liable.

In *Seward v. Town of Milford*, *supra*, the following instruction to the jury was approved by this court: "If the town put up

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proper guards to notify and keep travellers from going on the dangerous track, and kept them up until the night of the accident, and such guards were removed by some person in the dark, it is not liable." The case of *Doherty v. Inhabitants of Waltham*, 4 Gray, 596, is closely analogous to this case in its facts relating to the putting up and the removal of the barriers. The workmen, before they left the work at sundown, put up barriers around the well which they were digging in the street. Between 9 and 10 o'clock the same night the obstruction had been removed, either by accident or design, but at what time there was no evidence, and the plaintiff fell into the well and was injured. The jury were instructed that the town would not be liable "unless it had reasonable notice of the removal of the barriers, and that the road had by such removal become again dangerous," and this instruction was approved. In *Aylesworth v. C. R. I. & P. R. R. Co.*, 30 Iowa, 459, the court said: "It is the duty of railroad companies, under our statute, to fence their roads. It is also their duty to maintain and keep up the fences after they are made. But before the liability would attach in the latter case, in the absence of wrong on their part, they must have knowledge that the fence is out of repair and a reasonable time thereafter to put it in repair." In *Daniels v. Potter*, 4 Car. & P. 262, it is held that a tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured as that under ordinary circumstances it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it. Authorities to the same effect might be multiplied indefinitely, but a principle so clearly founded in reason needs no further support.

It appears by the evidence that this accident occurred about 9 or 10 o'clock in the evening, and the jury found that the barrier was up at 4 o'clock that afternoon, and they found further that it was not removed by the contractor or any one in his employ, and there was no finding or proof when the barrier was removed or by whom. The jury found that neither the contractor nor the city, nor any of its officers had notice before the accident that the barrier had been removed. If we were to construe this finding that the city had no actual or implied or presumptive notice of the removal, then by the above principle and authorities the plaintiff was not entitled to recover.

But we do not feel at liberty so to construe it, for the jury probably meant actual notice, as the matter of implied notice from lapse of time or from circumstances was not alluded to in the charge of the court as a principle that had any application to the case, and there was no finding on the question. The learned counsel of the respondent now insists that this court should hold that from the mere lapse of time, of about five hours, from 4 o'clock to the time of the accident, the city, through its officers or agents, is presumed, as a question of law, to have had notice. This might be a question of law for the court, if the jury had found all of the facts and circumstances from which a clear legal conclusion could be drawn, of notice or want of notice. But here there is an entire absence of facts pertinent to such an inquiry. We do not even know when the barrier was removed, and we know nothing of the relative situation of the street or the part of the street in which the barrier had been placed ; whether near to or distant from the centers of trade or business ; whether much or little used for travel ; how near to it were the residences or places of business of the officers or agents of the city, or how near to it they were likely to pass in going from place to place ; or any other material fact to be considered in forming such a legal conclusion. This presumption of notice must have some foundation of fact, and the facts must be such as to clearly raise the presumption, or neither the court nor jury would be justified in assuming that the city had such notice. The special findings of the jury in these respects are defective, and they are also defective in not finding that the barriers that were put up were reasonably sufficient to prevent such an accident. For these reasons the judgment must be reversed and a new trial had.

This opinion has been extended perhaps to a needless length, but the main question is an important one, and likely to arise in many kindred cases.

By the Court.—The judgment of the County Court is reversed, and a new trial ordered.

Judgment reversed.

COOK v. McCABE.

(58 Wia. 250.)

Contract — to build house — destruction by fire before completion.

Where one having nothing to do with the painting, glazing, carpenter or joiner work, contracted to furnish materials for the mason work of a building and perform the labor thereon, except that the owner for whom the same was to be constructed was to furnish, upon the ground, all the sandstone and a certain quantity of lime, and haul all the brick, and the building, not being in the exclusive possession of such contractor, just before completion was destroyed by fire, without the fault of the contractor, the loss must fall upon the owner, especially where he had the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed.*

ACTION for services and materials. The opinion and head-note show the facts. The plaintiff had judgment below.

Finch & Barber, for appellant.

Weisbrod & Harshaw, for respondents.

CASSODAY, J. Neither party offered to furnish materials, and rebuild and restore the portions of the building destroyed by the fire. On the contrary, each insisted upon the other suffering the loss. A large number of cases are cited in support of the proposition that in case of an entire and indivisible contract for the building of a house for a specified sum, to be paid on its completion, and where the edifice is destroyed by fire during the progress of the work, the builder must bear the loss, and be at the expense of repairing the damages. The principle underlying the proposition contended for, to a certain extent, is undoubtedly correct.

In *Brecknock Canal Co. v. Pritchard*, 6 T. R. 750, the bridge which the contractor agreed to build was broken down by an extraordinary flood, and KENYON, C. J., said: "If the defendants had chosen to except any loss of any kind it should have been introduced into the contract by way of exception." So it was held, on the authority of Lord Chief Justice HALE, that "the lessee of a house, who covenants generally to repair, is bound to rebuild it

* See note, 38 Am. Rep., 205.

if it be burned by an accidental fire." *Bullock v. Dommitt*, id. 650. See *Walton v. Waterhouse*, 2 Saund. 420; s. c., 3 Keb. 40; 2 Williams' Notes to Saunders' R. 826; *McKenzie v. McLeod*, 10 Bing. 385; *Phillips v. Stevens*, 16 Mass. 238; *Dermott v. Jones*, 2 Wall. 1; *Kramer v. Cook*, 7 Gray, 550. So it has been held that "where a contract is made to build and complete a building, and find materials, for a certain entire price, payable in installments as the work progresses, the contract is entire; and if the building, either by fault of the builder or by inevitable accident, is destroyed before completion, the owner may recover back the installments he has paid." *School Trustees of Trenton v. Bennett*, 27 N. J. L. 513. So it has been held that non-performance by a builder, under such an entire contract, was not excused by the destruction of the building by lightning. *School District v. Dauchy*, 25 Conn. 530. So "where a person contracted to build a house on the land of another, and the house was before its completion destroyed by fire, without his fault, it was held that he was not thereby discharged from his obligation to fulfill his contract." *Adams v. Nichols*, 19 Pick. 275 (31 Am. Dec. 137).

Such cases are distinguishable from one where the contractor agrees to repair another's house already built, and it burns before completion of the repairs. *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 517; s. c., 9 Am. Rep. 65.

But the case at bar is not one of entire contract to complete an entire building. It is more like *Brumby v. Smith*, 3 Ala. 123, in which it was held that "where a workman agreed to complete the carpenter's work on a house, and to receive a certain sum on the completion of the work, his employer furnishing the materials, and the house and materials were destroyed by fire, without the fault of the workman, the house being in the possession of the employer, held, that the workman could not recover a *pro rata* compensation for the work actually done."

The opinion in that case is based upon *Cutter v. Powell*, 6 T. R. 320, and *Menetone v. Athawes*, 3 Burr. 1592. In *Cutter v. Powell* the sailor was to be paid the sum named, "provided he proceed, continue, and do his duty on board for the voyage;" and that case, in the language of ALLEN, J., in *Wolfe v. Howes*, 20 N. Y. 200, "is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages,

undertook to insure his own life, and to render, at all hazards, his personal services during the voyage, before the completion of which he died." Lord KENYON, in deciding *Cutter v. Powell*, refers to the peculiar terms of the contract, and says "it was a kind of insurance." Page 324. See *Taylor v. Laird*, 25 L. J. (Exch.) 329. In the other case referred to, *Menstone v. Athawes*, the shipwright took the ship to his own dock for repairs, the owner agreeing to pay a sum named for the use of the dock, and also for the repairs; and it was held that "the value of repairs may be recovered though a ship be burnt in dock."

In *Niblo v. Binasse*, 1 Keyes, 476, it was held that, "if the owner of a building contracts for labor upon it, he is under an implied obligation to have the building ready and in a condition to receive the labor contracted for; and if before the work is completed the building is destroyed by fire, without the fault of the contractor, the owner is in default, and the contractor can recover for all that was done up to the time of the fire." In that case, as well as this, the time of performance had been extended by the mutual assent of the parties to the contract. *Schwartz v. Saunders*, 46 Ill. 18, was a case where "the plaintiff entered into contract with the defendant to do the carpenter work and furnish the materials therefor upon a brick building; the mason work was to be done by another and independent contractor. After the brick work was nearly completed, and a part of the carpenter work done, the brick walls were blown down. Held, that the loss as to the carpenter work fell upon the defendant." The court properly distinguished the case from some of the cases cited above, on the ground that "the plaintiff had not undertaken to erect and finish this building and deliver it."

In *Rawson v. Clark*, 70 Ill. 656, the contractors agreed to manufacture, and put into a building then in process of construction certain iron work, but were prevented from completing their contract by the building being destroyed by fire without their fault; and the court held that they could recover *pro tanto*, and without performing the balance of their contract.

Hollis v. Chapman, 36 Tex. 1, was a case where the plaintiff, a carpenter, undertook to furnish materials, and do the wood work necessary to finish defendant's brick building, and to turn over the building, complete, by a given day, for a specified gross sum. When the plaintiff had nearly completed the work the building was de-

stroyed by fire, without his fault; and the court held that the plaintiff was entitled to recover for the materials furnished, and work done by him. Stress was there laid upon the fact that the contract was conditional — that is, dependent upon the execution of another contract; and hence it was held to be apportionable, and the contractor entitled to a *pro rata* pay for his work.

Taylor v. Caldwell, 3 Best & Smith, 826, was a case of destruction by fire of a music hall engaged for concerts, and it was held that both parties were thereby excused from performance, because the general rule requiring absolute performance "is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied." It was there also held that "where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without the default of the contractor.

In the case at bar, as stated, Cook, Brown & Co. were not to do any of the carpenter work, joiner work, painting or glazing, and only to perform so much of the stone, brick and mason work, and furnish so much of the material therefor as was not to be furnished and performed by McCabe, who expressly agreed to furnish upon the ground all the sand and stone, and twenty-four barrels of lime, and to haul all the brick, and to furnish all good suitable materials. It is evident from the contract that the materials for the mason work and the labor thereon were to be furnished and performed by Cook, Brown & Co. and McCabe, acting in conjunction with each other. The completion of the mason work, which was thus to result from their joint action, must necessarily have been dependent more or less upon the performance of the painting, glazing, carpenter and joiner work, with each and all of the persons doing the several kinds of work occupying the building, or portions of it, at the same time. With much of the material and

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the land belonging to McCabe, and the materials furnished by Cook, Brown & Co., together with the value of their labor thereon, becoming a part of the realty as fast as the same became attached to the soil, it would seem that no injustice can be done, and no legal principle violated by treating the structure, as far as completed, as the property of McCabe, especially as he so treated it himself, and got it insured for his own benefit, and when burned received the insurance therefor.

The facts stated clearly distinguish the case from *Jackson v. Cleveland*, 15 Wis. 107, and all the other cases cited by the counsel for the appellant, unless it is *Brumby v. Smith*, 3 Ala. 123; and that, in our judgment, is not sustained by principle or authority, and should therefore be disapproved. Upon principle, as well as the authorities cited, we are induced to hold that (1), where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. (2) But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied. (3) Where from the nature of the contract it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor. (4) Where as here, one having nothing to do with the painting, glazing, carpenter or joiner work, contracts to furnish materials for the mason work of a building and perform the labor thereon, except that the owner, for whom the same is to be constructed, is to furnish upon the ground all the sand, stone, and a certain quantity of lime, and haul all the brick, and the building, not being in the exclusive possession of such contractor, just before the completion is destroyed by fire, without the fault of the contractor, the loss must fall upon the owner, especially where he

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has the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed.

With our construction of the contract the defendant was entitled to sixty days within which to make payment of the balance of the contract price, without interest; but if he delayed payment for six months then he agreed to pay seven per cent, and if one year then ten per cent. These provisions for interest and an increase of interest were, in our opinion, merely to stimulate the defendant to pay promptly at the end of sixty days, or at the most, within six months, and not for the purpose of giving an absolute credit of one year.

The measure of damages in such a case is *prima facie* the *pro rata* share of the contract price. *Trowbridge v. Barnett*, 30 Wis. 661; *Danley v. Williams*, 16 id. 581.

We are inclined to think that counsel for the appellant is right in contending that this was not a proper case for a forced reference; but with our view of the law the court would have been authorized, upon the undisputed evidence, to direct a verdict for the plaintiffs; and as the amount, under such evidence, could not have been less than the amount found by the referee, the defendant has in no way been injured, and therefore upon a well-established principle we should not disturb the judgment.

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

ROSENFELD V. HAIGHT.

(33 Wis. 232.)

Partnership — what constitutes — loan for profits.

H. agreed to "loan and advance" to M. and L., under the firm name of N. Bros., \$5,000, from time to time, as the business might require; the money to remain a permanent fund not less than one year nor more than five years. In consideration of this, N. Bros. agreed to devote their time and skill to the business, to keep accounts, open to H.'s inspection, and pay him semi-annually three-fifths of the profits, guaranteeing that they should amount to at least \$3,000 annually. For security, H. was given a lien on all the firm property. The agreement might be continued by H., for ten years.

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N. Bros. were to contract no debts outside the business, and not to draw on the firm property except for necessary support. A violation of the contract was to be "regarded as an end of the loan," and H. might then seize all the firm property to satisfy his advances. *Held*, that H. was a partner as to third persons.

ACTION on promissory notes. The opinion states the case. The defendant had judgment below.

Weisbrod & Harshaw, for appellant.

A. Haight, respondent, in person.

COLE, C. J. It is sought to hold the defendant Haight liable on the notes in suit, on the ground that he was a partner of Neumann Bros., by which firm the notes were executed. Haight, both by answer and affidavit, denies that he was a partner of that firm and responsible for the payment of the notes. The notes were given by Neumann Bros. in October and November, 1879, payable to the order of the defendant Wolcott, who indorsed them to the plaintiff before maturity. The question whether Haight was a partner of the firm of Neumann Bros. at that time, so as to be liable on the notes, mainly depends upon what construction is placed upon the written agreement offered in evidence bearing date December 2, 1878, entered into between Haight of the one part, and Morris and Lewis Neumann, copartners and manufacturers of cigars in the city of Oshkosh, of the other part. By that instrument Haight agreed to loan and advance to Morris Neumann and Lewis Neumann, as copartners under the firm name of Neumann Bros., the sum of \$5,000 from time to time, as the interest and requirements of the business might demand, and such part thereof as Haight should advance was to remain a permanent fund in the business of manufacturing and selling cigars in the city of Oshkosh, for and during the term of not less than one year, nor more than five years, from the date of the agreement, at the option of Haight, except as was therein otherwise stipulated.

In consideration of the sum of \$5,000 loaned and advanced by Haight to Neumann Bros., they agreed to devote their whole time and skill to the business aforesaid; to keep accurate and open account of all stock purchased for the business and prices paid therefor; also of all sales of cigars, the persons to whom sold, and the

amount received therefor ; also to keep a daily cash account of all sums received and paid out in said business, which books were at all times to be open to the supervision and inspection of Haight. In consideration of the use of the money, Neumann Bros. agreed to pay Haight, once in each and every six months, three-fifths of all the profits growing out of said manufacturing business, and Neumann Bros. guaranteed that three-fifths of the profits of the business should amount to at least \$3,000 per annum. As security for the money advanced by Haight to Neumann Bros., he was to have a lien upon all the tobacco, notes, accounts and other property of the firm, and had the option to extend the agreement for a period of ten years from date. All moneys above \$5,000 which Haight might advance or loan the firm, it was provided should be loaned upon the same condition. Neumann Bros. bound themselves to contract no debts outside of the legitimate business of manufacturing and selling cigars during the term of the agreement, and they also agreed to use no funds or other property of the copartnership of Neumann Bros. except what might be necessary for their support. A violation of the conditions of the contract by Neumann Bros. was "to be regarded as an end of the loan," and thereupon Haight was authorized to take immediate possession of all company property and sell the same, or a sufficient quantity thereof to satisfy the amount of money advanced by him to the firm, and all sums due him from the firm. These are the material parts of the agreement.

Now the learned counsel for the plaintiff insist that under the terms of this agreement the defendant Haight indisputably became a partner of the firm of Neumann Bros., and is responsible for its debts. They claim and argue that the instrument itself shows that Haight loaned the firm \$5,000, which was expressly made a permanent fund for carrying on the business of manufacturing and selling cigars ; that Neumann Bros. made no promise nor entered into any obligation to repay that loan at any time, and that the manifest intention of the parties was that the sum loaned should remain and constitute the capital while the partnership existed. This sum, it is said, was to be used and employed in carrying on the business, as well for the benefit of Haight as the other members of the firm. Further that no rate of interest for the loan was agreed upon by the parties ; that Haight was to have three-fifths of the profits of the business for the use of his money. It is said that

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he was to have that share of the profits as such ; had a right to have an account taken of the business at the end of each six months, and a division of the profits in that proportion, whatever they might appear to be. The contention is that this clearly made him a partner within the principles of law relating to partnerships.

This argument appears to us sound and incontrovertible. But it is said in answer to this view, that the intention of the parties was that Haight should receive three-fifths of the profits of the business as a mode of compensation for the use of his money, but that he was not to participate in the profits as such. On looking at the different clauses of the agreement, it is very clear to our minds that this construction is not correct. We have no doubt in the language of the authorities, that Haight had an interest in the profits as profits, because he could claim at the end of each six months three-fifths of the profits specifically, whatever they might appear to be. Certainly he had the right at that period to insist upon an accounting, and a division of the profits. Neumann Bros. were prohibited from using the funds or other property of the copartnership during the continuance of the term, except such as might be necessary for their maintenance and support, showing that they were not the sole owners or proprietors of the concern. Probably there would not be any doubt upon this point were it not for the clause wherein Neumann Bros. guarantee that three-fifths of the profits should amount to at least \$3,000 per annum. But that stipulation was obviously inserted for the benefit of Haight, and with the evident purpose of securing to him at all events that sum in case the business was not successful, or the anticipated profits were not realized. If Haight was to have an interest in the profits as profits, it is manifest there would necessarily be a community of loss as well as of profit involved in the agreement. In other words, there would be a partnership according to this common test.

But it is said the facts of the case are quite analogous to those involved in *Cooper v. Tappan*, 9 Wis. 361 ; *Ford v. Smith*, 27 id. 261 ; *Richardson v. Hughitt*, 76 N. Y. 55 ; s. c., 32 Am. Rep. 267 ; and *Eager v. Crawford*, 76 N. Y. 97. In *Cooper v. Tappan*, an agreement was made that a party was to receive as his share of the business \$250 every six months, in consideration of \$2,000 advanced to the concern, without any reference to the fact whether the business produced a profit or not. Notes were given for the amount, payable every six months, and also for the sum advanced. That

fact, and the additional fact that the payee was to have an absolute sum as his share of the profits, without reference to whether there were any profits or not, were strongly relied on as showing that there was no community of profit and loss in the business, or in other words, that a partnership did not exist between the parties.

In *Ford v. Smith*, "there was no evidence proving or tending to prove an agreement to divide the profits as such. The division of the profits, if any, was at most a mere arrangement by which Imus was to obtain compensation for his labor and services, or as wages to be paid him." Page 266.

The case of *Richardson v. Hughitt* is more similar in its facts to the one at bar, but still that is distinguishable. The court construed the agreement in that case as amounting to a contract for a loan, and the provision as to profits being intended merely as a mode of providing compensation to the lender for the use of his money advanced. The lender there received the share of the profits not as a partner, but on account of the debt owing to him by the firm; the court holding that he was only interested in the profits of the business as a measure of compensation for the use of his money. *Eager v. Crawford*, is so unlike the present case that we do not deem it necessary to comment upon it. We think the case before us is more analogous to that of *Leggett v. Hyde*, 58 N. Y. 272; s. c., 17 Am. Rep. 244; *Whitney v. Ludington*, 17 Wis. 140; *Miller v. Price*, 20 id. 117; *Upham v. Hewitt*, 42 id. 85. The case of *Leggett v. Hyde*, in its leading facts, is much like the one at bar. There it was held that "one who is interested in the profits of a business as profits, and not as a means of compensation for services, is a partner as to third persons, and is liable as such for the debts. Defendant H. loaned to the firm of A. D. P. & Co. \$2,000, to be used in the business for one year, under an agreement that he was to receive one-third of the profits, which were to be settled half-yearly, and at the end of the year, if he did not conclude to become a partner, he was to be repaid his \$2,000 out of the concern." The court held (CHURCH, C. J., dissenting) "that the money so invested was used by the firm for the benefit of H.; that he had an interest in the profits as such, not as a measure of compensation, but as a result of the capital and industry, and that as to the creditors of the firm, he was a partner." These head-notes correctly state the decision, which is quite instructive, and reviews many cases on this branch of the law. But still that case

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is distinguishable from the one at bar; for there the lender was to be paid his \$2,000 if he did not become a partner. Here no provision is made by any undertaking entered into by Neumann Bros., for the repayment of the money advanced; the only provision upon that subject being that in case of a violation of any of the conditions of the agreement, the loan was to be regarded as at an end, and Haight was authorized to take possession of the property of the firm and sell it, and thus reimburse himself for all advances made. As we have said before, we cannot doubt that by the terms of the agreement he became a partner of the firm of Neumann Bros.

The judgment of the Circuit Court must therefore be reversed, and a new trial ordered.

By the Court.—So ordered.

Judgment reversed.

WIENER V. WHIPPLE.

(53 Wis. 208.)

Agency — sale — memorandum signed by agent — evidence.

A memorandum of sale was written by the vendor in his book, and signed by him, and by the purchaser's agent in his own name. *Held*, a valid contract, not to be varied by parol.

ACTION for breach of contract. The head-note and opinion show the facts. The plaintiff had judgment below.

Smith, Rogers & Frank, for appellant.

Harlow Pease, for respondent.

TAYLOR, J. The case presents this question: Was it competent for the plaintiff, after having made and signed the writing above set forth, to show by parol that the purchase was a purchase by sample? The respondent testified that after he made the purchase of the agent of the appellant, he paid the \$25, and then took out his memorandum book and wrote the above-quoted memorandum therein, which was signed by himself and the agent of the appellant. The respondent kept the memorandum in his possession.

On the part of the learned counsel for the appellant it is urged that this writing is in itself a perfect contract, which shows on its face that the respondent purchased of the appellant 300 bushels of barley at a price named, to be delivered within a specified time; and that the same being signed by the agent of the appellant, although in the name of the agent, it bound the appellant to deliver the barley according to its terms. We are inclined to think the question of the admissibility of the parol evidence showing the terms of the sale depends upon the question whether the appellant was bound by the terms of the writing. If the appellant were not bound by its terms, then the respondent would not be. If the respondent, after making the contract of purchase, had made an entry of the terms of the sale in his memorandum book for the mere purpose of aiding his memory in regard to the matter, and for his own convenience, without requiring the agent of the appellant to sign the same, such memorandum would not constitute the contract between the parties, and would bind neither. It would have no greater effect as proof of the contract in fact made by the parties than any other entry made by a party, to which he might refer for the purpose of refreshing his memory as to the terms of the transaction. The appellant would not be bound by such an entry because made without his being called upon to consent to its terms; and the respondent would not be bound because it would be held to be a mere memorandum of the transaction in aid of his memory, and not intended as binding him to its exact terms. The appellant would be at liberty to insist that the parol contract was the only contract he had made. The writing made without his assent thereto by the other party could in no way bind him, and consequently would not bind the other contracting party. If in such case the appellant insisted that the parol contract was in fact the same as the writing made by the respondent in his memorandum book, such memorandum could be used as an admission of the respondent to support his version of the contract, and to that extent only would it be evidence for him.

The effect of a memorandum of sale, made without the assent or authority of all the parties to the contract, is illustrated by the decisions of the courts upon the sufficiency of such unauthorized memorandum to satisfy the statute of frauds. It has been often held that the party not assenting to the making of such memorandum is not bound thereby, and may prove the terms of the parol

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contract for the very purpose of showing that the memorandum does not state the real contract between the parties and so defeat a recovery upon it under the statute of frauds for want of a sufficient note or memorandum thereof in writing. See Benjamin on Sales (3d Am. ed.), §§ 209, 212, and notes. It is evident that the principle of these cases can have no application to a case where it is shown that both parties have assented to and signed the writing. It is well settled by the authorities that where a writing contains in itself all the elements of a valid agreement to sell on the one part and buy on the other, so far as the writing sets out, either in express terms or by legal intent, the conditions of the contract, it cannot be varied by parol evidence.

It is said on the part of the learned counsel for the respondent that this writing does not bind the appellant, because his agent signed his own name and not the name of his principal, and so it should not and does not bind the respondent. It is also said that the appellant's agent signed the memorandum as a mere acknowledgment of the receipt of the \$25, and not as assenting in any way to its terms as an agreement to sell. The cases are very clear that when a person acts for a principal, and such fact is known to the party dealing with him, his contract, though executed in his own name, binds his principal equally as though signed in the name of such principal, and that parol evidence is admissible to show the fact of his agency in order to charge the principal, notwithstanding the writing is executed by the agent in his own name. Benjamin on Sales, § 236; *Trusman v. Loder*, 11 Ad. & El., 587-594; *Stowell v. Eldred*, 39 Wis. 615; *Taintor v. Prendergast*, 3 Hill, 72; *Higgins v. Senior*, 8 M. & W. 840; *Huntington v. Knox*, 7 Cush. 371; Story on Agency, § 410. Many other cases might be cited to the same point. These cases go so far as to hold that such signature of the agent is good under the statute of frauds. The signature of the agent in such case is deemed the signature of the principal, and is a sufficient signing to take the case out of the statute.

In an action upon this writing by the respondent against the appellant, it seems to us clear that the appellant would be bound by its terms. Had the price of barley advanced, he would be bound to deliver according to its terms for the price fixed therein. In our opinion the writing signed by the vendor admits that the vendee, whose name is also signed thereto, bought of him 300 bushels of

barley at 65 cents per 50 lbs., to be delivered as therein stated, and that the vendee had paid him \$25 on the contract price. All these matters are made clear by the writing itself in express terms. It is equally clear, that from the terms of the writing the law implies that payment was to be made on delivery, and probably that the barley should be merchantable; but for the purposes of this case it is unnecessary to determine whether the merchantable quality of the barley to be delivered is a legal implication from the terms of the contract or not. It is enough for the determination of this case to know that there is neither an express statement in the writing, nor a legal implication from what is stated, that the barley was sold by sample, or that it should be of the quality of a sample furnished to the buyer at the time of the contract. This court has repeatedly held that where there is a written instrument binding upon both of the parties thereto, which in itself is a complete contract capable of being understood and enforced, parol evidence cannot be resorted to to change its express provisions or their legal effect. In *Charles v. Denis*, 42 Wis. 56; s. c. 24 Am. Rep. 383, it was held that one who indorses a note in blank, without any qualification to such indorsement in writing, cannot show by parol any matter which varies or contradicts the legal liability which the law attaches to such indorsement. In that case the indorser offered to show that when he indorsed the note it was understood and agreed between the parties that he should not be liable upon such indorsement, and that it was simply made to transfer the title to the note.

The written contract being plain and unequivocal, no parol evidence can be given to explain or change its terms. *Peet v. Railroad Co.*, 19 Wis. 118; *Same v. Same*, 20 id. 594. These cases involved the construction of a contract in the shape of a receipt given by the railroad company for freight agreed to be transported by it. It was held that by the terms of the receipt the railroad company agreed to transport to and deliver in New York, and it could not show by parol that it was agreed that it should deliver the goods at the terminus of its road in Chicago to another carrier, to be transported from there to New York by such other carrier. The case of *Meyer v. Everth*, 4 Camp. 22, was in all respects like the case at bar. The plaintiff had bought "50 hogsheads of Hambro sugar loaves at 155s., free on board a British ship; acceptance, 90 days." The writing in the case was what is called a bought note,

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signed by the defendant, and the description of the sugar bought, with price, etc., was as above quoted. In his complaint the plaintiff alleged that he purchased the sugar by sample; and alleged, as a breach of the contract, that the sugar delivered was not as good as the sample. Lord ELLENBOROUGH nonsuited the plaintiff on the trial, giving the following reasons: "It was no part of the contract that the sugar should be equal to the sample. Where goods are sold in this way, I think evidence might be admissible to show that at the time of the sale a sample was fraudulently exhibited to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity which turned out of greatly inferior quality and value. But when the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would be contrary to *Meres v. Ansell*, 3 Wil. 275, and would amount to an admission of parol evidence to contradict a written document." *Gardiner v. Gray*, 4 Camp. 144, was in all respects like *Meyer v. Everth*, and a like decision was made by the same learned judge. Although these are *nisi prius* cases, they are considered good law in England, and are quoted as authority in Benjamin on Sales (3d ed.), § 650. These decisions are sustained upon the well-settled rule that parol evidence cannot be received to contradict, vary or add to a written contract, perfect in itself.

This court has adhered strictly to the rule that a written contract cannot be varied or changed by parol proof. See *Whiting v. Gould*, 2 Wis. 552; *Lowber v. Connit*, 36 id. 176; *Hubbard v. Marshall*, 50 id. 322; *Schultz v. Coon*, 51 id. 416. In the last case cited the written contract of sale was hardly as definite as the one proved in the case at bar, yet this court held that it was evidently a contract of sale, and parol evidence could not be given to vary or contradict its terms.

It appearing that the contract was in writing, and such written contract failing to show that the sale was by sample, it was clearly error to permit the plaintiff to show by parol that the sale was in fact made by sample. Upon the competent evidence given upon the trial, the question whether the sale was by sample or otherwise was immaterial, and should not have been submitted to the jury.

The judgment of the County Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

Eagle Mowing & Reaping Machine Company v. Shattuck.

EAGLE MOWING & REAPING MACHINE COMPANY V. SHATTUCK.

(53 Wis. 455.)

Statute of frauds — guaranty.

A guaranty by a debtor of a note of a third person turned out for his debt is not within the statute of frauds.*

ACTION on a guaranty expressing no consideration. The opinion states the facts. The defendant had judgment below.

Timlin & Manseau, for appellant.

R. L. Wing, and *Ed. E. Bryant*, for respondent.

CASSODAY, J. Section 2307, R. S., among other things, provides, in effect, that "every special promise to answer for the debt, default or miscarriage of another person, * * * shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith." This statute has been in force for many years. Sec. 2, ch. 107, R. S. 1858. This court, as well as others, has frequently held that no "special promise to answer for the debt, default or miscarriage of another person" can be enforced unless it be in writing, subscribed by the party, and expressing a consideration. *Taylor v. Pratt*, 3 Wis. 674; *Reynolds v. Carpenter*, 3 Pinney, 34; *Day v. Elmore*, 4 Wis. 190; *Houghton v. Ely*, 26 id. 181; *Parry v. Spikes*, 49 id. 384. But can it here be reasonably claimed that the promise of the defendants, sued upon, was to answer for the debt, default or miscarriage of another person? At the time of the accounting and settlement of the defendants with the agent, the maker of the note in question was not indebted to the plaintiff, but to the defendants. The note was not given for property belonging to or furnished by the plaintiff, but for property belonging to and furnished by the defendants. The note at the time was the property of the defendants.

The defendants being indebted to the plaintiff for money or notes taken for the plaintiff's machines, and by them converted to their own use, turned out the note in question, with their guaranty upon

* To same effect, *King v. Summit* (73 Ind. 312), 38 Am. Rep. 145.

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it, as their own property, in payment of their own debt. Are they to be discharged of their debt without being held liable on their guaranty? Does the case come within the language or meaning of the statute? Was the promise of the defendants any thing more than a promise to pay their own debt in the manner stated? We think it was not, and the case therefore comes clearly within the rule of *Wyman v. Goodrich*, 26 Wis. 21, where it was held that "where the owner of a note, as part of the terms of sale thereof, guarantees its payment, his contract is not within the statute of frauds." It was not the consideration of the note which was the basis of the promise of the defendants to the plaintiff, but the money or property of the plaintiff, which the defendants had converted to their own use, and which they undertook to pay by the transfer of the note with their guaranty upon it. It was in form a guaranty of the payment of the note, but the guaranty was in fact made in payment of their own debt. Such a case is neither within the letter nor spirit of the statute, as abundantly appears from the decisions of this court, and cases therein cited. *Dyer v. Gibson*, 16 Wis. 557; *Putney v. Farnham*, 27 id. 187; *Young v. French*, 35 id. 111. See also, *Barker v. Scudder*, 56 Mo. 272; *Hall v. Rodgers*, 7 Humph. 536; *Fowler v. Clearwater*, 35 Barb. 143.

The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

New trial ordered.

MORGAN V. EDWARDS.

(26 Wis. 559.)

Negotiable instrument — provision for attorney's fee — power to hasten maturity.

A promissory note, conditioned to pay expenses of collection, including attorney's fees, and giving the payee power to declare it due at any time he may deem it insecure, is not negotiable.*

ACTION on a promissory note. The opinion shows the points. The defendant had judgment below.

S. W. McCaslin and Frederick K. Conover, for appellant.

* To same effect, *First Nat. Bk. of New Windsor v. Bynum* (34 N. C. 24), 27 Am. Rep. 604.

Manwaring & Shafer, for respondents.

LYON, J. The only question to be determined on this appeal is, whether the instrument in suit is a promissory note. If a note, it is negotiable as a matter of course, because by its terms it is payable to the payees named therein or order.

Mr. Byles, in his treatise on Bills and Notes, defines a promissory note as being "an absolute promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer." Page 11. Judge STORY, in his commentaries on the Law of Promissory Notes, says: "A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Page 2.

It is claimed that the instrument in suit is not a promissory note, because: (1) The stipulation to pay expenses of collection makes the amount uncertain which the defendants promise to pay. (2) The right given the payees to declare the money due at any time they may deem themselves insecure also rendered the time uncertain when the money would become payable. (3) By the terms of the instrument, the title to and the ownership and right to the possession of the machine for which it was given, remained in the payees, and hence the instrument shows on its face that there was no consideration for it.

These propositions were very ably argued by the learned counsel for the respective parties, and they referred us to numerous adjudications bearing upon them. The learning and research of counsel have greatly aided us in our deliberations upon the case. On the first two of the above propositions there is much conflict in the cases. Many courts whose decisions command the highest respect have held that stipulations like those under consideration, in an instrument which would otherwise be a negotiable promissory note, destroy its character as such, while many other courts of equal authority have held the contrary doctrine. The cases on the subject are too numerous to be here cited, but references to many of them will be found in the briefs of the respective counsel. It may be remarked, preliminarily, that the statute (R. S. 495, § 1675) is merely a re-enactment of the substance of the Statute 3 & 4 Anne, c. 9, which was passed for the purpose of establishing the negotiability

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of promissory notes, that quality having been denied to them by Lord HOLT, in *Clerke v. Martin*, 2 Ld. Raym. 757. See Smith's Merc. Law, 199. Neither the statute of Anne nor our statute attempts to define a promissory note, or to state its essential qualities. To ascertain these we must refer to the principles of mercantile law as laid down in approved treatises, and in those adjudged cases which are regarded as authoritative.

The first specific ground upon which the negotiability of the instrument in suit is denied will now be considered. The instrument contains this clause: "We also agree to pay all expenses, including attorney's fees, incurred in collecting;" meaning of course in collecting the money which the defendant therein promised to pay E. M. Birdsall & Co., or order. The sum to be so paid is uncertain in amount, and dependent upon the contingency that expenses in that behalf are incurred. The promise to pay such expenses (if any are incurred) is a part of the instrument, and cannot be separated from the preceding promise therein to pay a specified sum and interest. The payment of the certain and the uncertain amounts, added together, is, so to speak, the aggregate promise in the instrument. It would seem therefore on principle that there is an element of uncertainty in the instrument in respect to the sum of money for which it was given. If so, it contains no promise to pay a certain or specified sum, and hence, under all or nearly all of the authorities, is not a promissory note.

A large number of cases have been cited which hold that if the amount payable at the maturity of the paper is fixed and certain — the instrument containing the other essentials of a note — it is still a note, although it contains a further promise to pay an uncertain sum for expenses or costs of collection if not paid at maturity, or if suit be brought upon it. We have examined many of these cases, and in all thus examined we find express stipulations that such expenses or costs are only payable provided default be made in the payment of the note at maturity, or unless suit be brought upon it, which implies a default. But as already intimated, there are many adjudications holding that an instrument containing such a stipulation, notwithstanding the amount due at maturity is fixed and certain, is not a promissory note.

The cases in this court which are claimed to have any bearing on the question at issue between the courts are *Leggett v. Jones*, 10 Wis. 34; *Blake v. Coleman*, 22 id. 415; and *Kirk v. Dodge Co. M. Ins.*

Co., 39 id. 138 ; s. c., 20 Am. Rep. 39. If there are any other cases decided by this court, affecting the question, we have failed to recall them.

In *Leggett v. Jones*, the opinion was expressed, confessedly upon a slight examination, that an instrument in the form of a promissory note, for the payment of a certain sum of money, "with exchange on New York," was in fact a promissory note. The question in that case was not whether the instrument was a note under the law merchant, but whether it was a contract for the payment of money only, under the Code. The question was answered in the affirmative, and that is the whole basis of the judgment. The case cannot justly be regarded as authority for the proposition that an instrument containing such a stipulation can be a promissory note, although it has been so referred to in some of the elementary books. But had this court so decided, it is believed that the judgment might be upheld on substantial grounds, without violating the rule which requires certainty in a promissory note as to the amount payable.

A note is payable in lawful money of the United States, which is at par in every portion of the country. If a note is made payable in Milwaukee, with exchange on New York, it requires precisely the same sum of money to pay it as would be required had it been made payable in New York. The exchange is the cost of drawing a bill and transmitting the money to New York to meet it. In *Leggett v. Jones* the note was payable to the Dodge County Bank, with exchange on New York. Had the note been made payable in New York, no one would claim that there was any uncertainty in the amount, although the maker would necessarily have been subjected to the expense, uncertain in amount, of providing funds there to meet it. It is precisely that expense which constitutes and governs the cost of exchange. Hence the same sum of money which would have been required to pay the note in New York would have paid it at the Dodge County Bank, including the exchange, according to its terms. In speaking of the cost of exchange, we refer only to transactions in money. Nominally, the cost of exchange may include the discount on the ordinary currency of the place where the bill is drawn, at the place of payment ; and such discount may greatly fluctuate. But a note payable with exchange is not affected by these facts, for it cannot be payable in any thing but money (unless by virtue of some special statutory provision), and still be

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a note. There can be no discount on *money* to affect the cost of inland exchange. Hence it may well be said that the uncertainty in the amount due on a note which stipulates for the payment of exchange between two points, is rather apparent than real and substantial.

Blake v. Coleman, merely decides that an unsigned memorandum on the back of a note, qualifying the time of payment, and which was placed there before the note was signed, became a part of the contract and binding upon the payee.

In *Kirk v. Dodge Co. Mut. Ins. Co.*, the instrument before the court was in the form of a negotiable promissory note made by the plaintiff to the defendant. It was therein stated that the same was given for premium for an insurance policy of a specified number. The note also contained the conditions that if not paid at maturity the whole premium on the policy should be considered earned, and the policy should be null and void while the note remained unpaid. The controlling question was, whether the instrument was a promissory note, and the court held that it was. Manifestly there was no uncertainty in the sum required to pay the note at maturity, or at any time after maturity. True, it provided that the penalty for default should be that certain other obligations should become due, presumably before the time of payment specified therein; but that provision did not make such obligations a part of the note then under consideration, or increase the amount of money required to pay and discharge such note. The note called for \$40, with interest, and there was no stipulation under which the maker could be required, under any circumstances, to pay more than \$40 and the accrued interest to discharge the note.

Obviously, none of these cases commit this court to either line of conflicting decisions before mentioned. We are thus free to choose between them when a case arises requiring a choice. This case does not require us to determine whether an instrument providing for the payment of an uncertain sum for expenses of collection, or of a suit, in case of default, can or cannot be a promissory note. The stipulation to pay such expenses, contained in the instrument in suit, is not made contingent upon default of payment at maturity. If the money had been paid at the specified place on the day it was due, the defendants would have been liable under their agreement to pay the holder's necessary expenses of receiving it. If the bank had received it for the plaintiff, it might lawfully

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have charged a fee for so doing, or the holder might have sent some other agent to the bank to receive the money, and such agent would have been entitled to compensation for his services. In either case the charges would be expenses incurred in collecting the money, and such expenses the defendants agreed to pay by the terms of the instrument. Because of this, and because the amount thereof is uncertain, the instrument is not a promissory note, and therefore not negotiable.

As the foregoing views are decisive of the case, necessarily resulting in affirmance of the judgment, it is thought advisable not to determine the other propositions so ably argued by counsel.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

FREEMAN V. STATE.

(11 Tex. Ct. App. 92.)

Criminal law — witness — accomplice in incest.

In incest the woman is an accomplice, and on the trial of a prosecution therefor her testimony is subject to the rule respecting accomplice testimony.
(See note, p. 789.)

CONVICTION of incest. The opinion states the case.

C. G. White, for appellant.

H. Chilton, assistant attorney-general, for State.

WINKLER, J. The indictment charges that the appellant, Jack Freeman, on or about July 10, 1881, in Smith county, State of Texas, "did then and there unlawfully, knowingly and feloniously carnally know and have carnal intercourse with one Jane Taylor, the daughter of Jennie Freeman by a former marriage, she the said Jennie Freeman being then and there the wife of said Jack Freeman, and he the said Jack Freeman well knew the said Jane Taylor

to be the daughter of his said wife Jennie Freeman at the time of his said carnal intercourse with her the said Jane Taylor as aforesaid." Having been tried and convicted and sentenced to the State penitentiary for a period of five years, the defendant has appealed to this court, his motion for a new trial having been overruled.

It is provided by statute that "All persons who are forbidden to marry by articles 330 and 331 of the Penal Code, who shall either intermarry or carnally know each other, shall be punished by imprisonment in the penitentiary not less than two nor more than ten years." Penal Code, art. 319. In article 330 are enumerated the females the law prohibits a man from marrying, and in article 331 are in like manner enumerated the male persons a female is prohibited from marrying in this State. Among the former it is declared that no man shall marry his wife's daughter, and among the latter it is declared that no woman shall marry her mother's husband after the death of her mother. Therefore if a man shall marry or carnally know his wife's daughter he would be guilty of the offense denounced in article 329 whilst, agreeably to the wording of the statute in article 321, a female is not prohibited from marrying her mother's husband until after the death of her mother. Thus the statute reads. Under the law the man was liable, whether the other party was or not, and his guilt was not dependent on her liability to prosecution.

On the trial below the principal witness for the State was the female named in the indictment of whom the defendant is charged to have had carnal knowledge. Under this state of case, counsel for the defendant requested the court to instruct the jury that the female was *particeps criminis*, and that they could not convict the defendant on her testimony unless corroborated by other evidence. The court refused to so instruct the jury, and a bill of exceptions was reserved. This ruling being assigned as error, it becomes necessary for this court to determine whether or not the prosecuting witness was an accomplice whose testimony needed corroboration in order to support a conviction. Mr. Wharton, in his recent work on Criminal Evidence, § 440, says: "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. The co-operation in the crime must be real, not merely apparent. Hence, although a woman who co-operates voluntarily with others to procure an abortion on herself is an accomplice, it is otherwise when

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she is the victim of force, fraud, or undue influence." With us, this court in *Watson v. State*, 9 Tex. Ct. App. 237, held on a full examination of authority, that a woman who assented to the giving her a drug in order to procure an abortion, was a victim and not an accomplice, and did not require to be corroborated. See the case and the authorities there cited. An informer who purchases intoxicating liquors sold contrary to law, for the purpose of prosecuting the seller, is not an accomplice in the sense of requiring to be corroborated, and so of one of the betters at the same game of faro, and of a detective who feigned complicity. *Stone v. State*, 3 id. 675; *Wright v. State*, 7 id. 574; s. c., 32 Am. Rep. 599. If a witness implicates himself, it is immaterial that he claims to have been coerced. *Davis v. State*, 2 Tex. Ct. App. 588. It would seem that in order to determine whether the witness in the present case was an accomplice or not, in the sense of requiring corroboration, the proper inquiry would be, did she knowingly, voluntarily, and with the same intent which actuated the defendant, unite with him in the commission of the crime charged against him? If she did, she was an accomplice, and her uncorroborated testimony would not support a conviction.

In our opinion this inquiry must be answered in the affirmative, and that a proper instruction on the subject of the necessity of corroborating the girl's testimony should have been given.

The other errors assigned are not deemed well taken, and need not be specifically considered. For the error in the charge of the court, the judgment will be reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.—The doctrine quoted from Wharton is laid down by him (Cr. Ev. § 440), but he cites only *People v. Josselyn*, 39 Cal. 303, which does not support the distinction, but only decides a question of what amounts to corroboration. We do not find the distinction laid down anywhere else. On the contrary, in *Watson v. State*, 9 Tex. Ct. App. 233, a case of abortion with the woman's consent, the court said: "There has been some contrariety of opinion and decision in the courts upon this subject. The rule that she does not stand legally in the situation of an accomplice, but should rather be regarded as the victim, than the perpetrator of the crime, is one which commends itself to our sense of justice and right, and there is certainly nothing in our law of accomplices which should be held to contravene it. The doctrine that she is not an accomplice, in the strict legal acceptation, has been held in England. *Rex v. Hargrave*, 5 C. & P. 170; *Reg. v. Boyes*, 1 B. & S. 311. This has been followed and adopted in New York. *Dunn v. People*, 20 N. Y. 523. In *Commonwealth v. Wood*, 11 Gray, 85, which was a case of abortion, the court say: 'We think the court rightly instructed the jury that the woman was not, under the statute, technically an accomplice, for she could not have been indicted with him.' " And the court hold that not being an accomplice the woman does not need corroboration. To the same effect, *State v. Hyer*, 30 N. J. 503. Incest perhaps stands on a different footing.

ROBINSON V. STATE.

(11 Tex. Ct. App. 408.)

Criminal law — larceny of lost goods.

A merchant sold a trunk to the defendant. Unknown to either, it contained goods previously sold to another. On getting the trunk home the defendants discovered the contents, and retained them. *Held*, that the larcenous intent need not have been formed at the time of the delivery of the trunk, but it was sufficient if it was formed at the time of the discovery of the goods.

CONVICTION of larceny. The opinion states the case.

H. Chilton, assistant attorney-general, for State.

WHITE, P. J. A. L. Morris, who was a dry goods merchant at Weatherford in Parker county, sold to two parties living in the country a coat and vest to one, and a coat to the other. These parties were to call, pay for, and get the articles in a few days. Meantime he placed the articles for keeping in a trunk in his store. One of his clerks sold this trunk a day or so afterward to defendant, and neither he nor defendant examined the trunk at the time, nor did they know of its contents, but both supposed it to be empty.

Defendant bought and paid for nothing but the trunk. He carried it home and there became apprised of its contents, but did not return the coats and vests, but shortly afterward when he moved from Parker to Johnson county, he carried the trunk and clothing with him. Morris, when he became aware of the loss of the goods, sent a deputy sheriff to Johnson county for them. Defendant at first denied to the officer that he had the articles, but subsequently, when the officer told him he was satisfied he did have them and that he might have trouble if he did not give them up, he said that rather than have any trouble he would give them up, and then went and got them and delivered them to the officer.

On the trial of defendant for the theft of the goods, the following, amongst other requested instructions asked in his behalf by his counsel, were refused by the court, viz.: "If the jury are satisfied from the evidence in this case that the property came into defend-

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ant's possession lawfully, and that at the time it so came into his possession he had no intent to steal the same, then the jury must find the defendant not guilty under the indictment." * * *

"If the jury are satisfied from the evidence, that at the time the defendant bought the trunk from Morris's clerk as detailed by the witnesses, the coats and vest named in the indictment were in the trunk and delivered to defendant, and by him carried away, he, the defendant, not knowing that the coats and vest were in the trunk until after he arrived at home with them, this would not be such a taking as to make it theft. To constitute theft there must be an unlawful intent at the time of the taking."

In lieu of these instructions the charge of the court as given declared the law in the following language, viz.: "If the defendant purchased and conveyed away the trunk, the said coats and vest being therein, and he, the defendant, at the time knew the goods were in the trunk, and he, the defendant, at the time further knew that the owner was ignorant of the fact that the goods were in the trunk, and such taking of the goods and trunk was, as far as the goods were concerned, without the consent of the owner and from his possession, and such taking of the goods was done with the intent to deprive the owner of the value of the same and appropriate the goods to his, defendant's, own use and benefit, then in law such taking would be a fraudulent taking. Again: if defendant bought and paid for the trunk, and neither he nor the seller knew at the time that said goods, to wit, said coats and vest, were in fact in the trunk, and if in a short time after carrying the trunk away the defendant found the goods in the trunk, and at the time, knowing the owner of the goods, formed in his mind the intention of fraudulently keeping and not restoring the goods, and if he, defendant, did under these circumstances, knowing the owner, retain the goods with intent to steal, then in such case in law defendant's taking would be a fraudulent one, and if proven guilty of the theft in every other respect, he cannot lawfully claim an acquittal on the ground that the taking was a lawful one."

Our Penal Code, in defining the legal meaning of the "taking" necessary and essential to constitute the crime of theft, declares that "the taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means the subsequent appropriation of it is not theft." Penal Code, art. 727. Appellant's counsel, in the refused instructions, has sought

to apply the terms of this provision literally to the case at bar. The idea conveyed is that if the trunk came lawfully into the possession of accused, all its contents came equally into his possession lawfully, and he could not be guilty of theft by a subsequent appropriation of them. This is not in fact true. The owner, or rather his clerk, whilst selling and delivering the trunk never intended to convey and did not convey either the title or possession of its contents; for he was wholly ignorant of its contents. So was defendant, when he purchased and became possessed of the trunk. The goods, so far as these parties were concerned, were lost, because they neither knew any thing of their existence or their whereabouts. When defendant opened, examined and came across them in the trunk, they were in every sense lost goods which he found; as much so as if he had come across them upon the public highway or any other place where the owner had dropped, mislaid, left them by mistake, or lost them. The *status* of the case is precisely that of the finding of lost or mislaid goods, and the law governing such a finding is the law applicable to the facts of this case. There can be no serious question, either in reason or law, why lost or mislaid goods may not be the subjects of theft. It has, we are aware, been held otherwise in two cases, one in Tennessee (*Porter v. State*, M. & Yerg. 226), and one in New York (*People v. Anderson*, 14 Johns. 293; 7 Am. Dec. 462), the ground assumed being that as a trespass is not committed in taking lost goods, they are not the subject of larceny. But elsewhere both in England and America the contrary doctrine is everywhere firmly settled and established.

Mr. Bishop says: "The law gives to the finder a title in lost goods, but not full and unconditional; and so if he takes them with the intent to steal them he commits a larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man knowing the owner of goods cannot lawfully pick them up, without returning them to him, but a man not knowing the owner can. The doctrine therefore is, that if when one takes goods into his hands, he sees about them any marks, or otherwise learns any facts, by which he learns who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise not. Some of the cases say if he knows who the owner is or has the means of ascertaining; but the better doctrine is as above set down, because every man by advertising and

inquiring can find the owner if he is to be found, while the guilt of the defendant must attach at the moment, if ever, without depending on an if." 2 Bish. Cr. Law (8th ed.), § 882.

The only distinction made between theft of lost goods and theft of other property seems now to be that at the time of the finding "the intent to steal must exist, and the finder must know or have the reasonable means of knowing or ascertaining the owner." 3 Greenl. Ev., § 159; 2 Hard's Lead Crim. Cas. 423-432; 2 Arch. Cr. Pl. and Pr. 388-395; *Reed v. State*, 8 Tex. Ct. App. 40; s. c., 34 Am. Rep. 732.

The doctrine in no wise contravenes the provision of our statute that the thing stolen must be taken from the possession of the owner or some one holding the same for him (P. C. art. 724); because the owner of lost property is not divested of his right of property in it by the loss, and that right draws to it constructively the possession wherever found. "The owner of goods need not keep a constant manual possession of them to be protected in his rights of ownership. And though he forget the place in which he laid them, or though for any other reason he knows not where they are, still they remain his." 2 Bish. Cr. Law, § 878. See also a very able and learned discussion of the whole subject in *Griggs v. State*, 58 Ala. 425; s. c., 29 Am. Rep. 762.

But suppose in the case before us, with reference to the owner's rights, the goods should be treated rather as mislaid than lost goods, the rules so far as the taker is concerned are the same, and the taking would be theft. *Id.* § 879.

But let us consider the subject of fraudulent intent, which is the gist of the offense of theft under our statute. It is said that this intent must exist at the time of the taking, and that no subsequent felonious taking will render the previous taking felonious. *Billard v. State*, 30 Tex. 367; *Johnson v. State*, 1 Tex. Ct. App. 118. As we have seen, defendant did not know that the goods were in the trunk when the trunk was taken; consequently his taking of the goods at the time he took the trunk was, so far as they were concerned, an involuntary act. With regard to them at the time of taking, he did not and could not have entertained any intention at all. His intentions, so far as they were concerned, could only be called into exercise and have had being when he found or discovered them in the trunk, and his criminality must attach at that time if at all, since it was impossible that a fraudulent intent could have

been entertained previously. If the fraudulent intent and taking did not occur then no subsequent felonious taking would constitute the crime.

If at the time of the finding (which was when he discovered the articles in the trunk), the felonious intent did not exist, though there may be a subsequent concealment of the goods or a denial of all knowledge of them, and a fraudulent appropriation of them, the offense is not larceny. Whether the criminal intent coexisted with the finding is a question for the jury. It may be a question of difficulty, but it is to be ascertained by the jury just as the intent with which any act done is ascertained—by a careful examination of the facts and circumstances attending and immediately following the finding. We quote from the case of *Ransom v. State*, 22 Conn. 156, as follows: "For the purpose of showing such intention, inquiries as to his, the finder's conduct, and all the circumstances preceding, accompanying or following such taking, so far as they are relevant, are as in all other cases of similar accusation, admissible; and when the goods were obtained by finding, it is from the nature of the case very important to ascertain whether the accused knew or had the means of knowing the owner, or endeavored to discover him, or made known or concealed his acquisition; and generally how he conducted with the goods in order to determine whether he intended originally to convert them to his own use or to restore them to the owner. No arbitrary or artificial importance or effect is attached to these circumstances when they are disclosed by the evidence; they are only evidential of the intention of the accused, and as such to be weighed by the jury." See also *Griggs v. State*, 58 Ala. 425; s. c., 29 Am. Rep. 762.

When the charge of the court as above quoted is subjected to the tests of the principles of law which we have discussed, we think it will be found to be substantially correct, and in the main entirely harmonious with them. On the other hand, it must be equally as apparent that the refused instructions did not embody correct principles of law. The court did not err in the charge as given, nor in the refusal of the requested instructions asked in behalf of defendant. Other questions are raised but the errors complained of are not deemed tenable.

We find no such error in the record as requires a reversal of the judgment, and it is therefore affirmed.

Affirmed.

Reed v. State.

REED V. STATE.

(11 Tex. Ct. App. 509.)

Criminal law — homicide — self-defense by one caught in adultery with defendant's wife.

Adultery being only a misdemeanor, one who being caught by a husband in adultery with his wife resists an attack made upon him by the husband, and kills him to save his own life, is guilty only of manslaughter

CONVICTION of murder. The opinion states the case.

R. Sarlls, for appellant.

H. Chilton, assistant attorney-general, for State.

WHITE, P. J. [Omitting a minor point.]

We propose next to notice what in our opinion constitutes the only remaining error shown by the record. In the thirteenth paragraph of the court's charge to the jury they were instructed that "When the husband takes a party actually engaged in the act of adultery with his wife, and he then and there attacks the adulterer, *the adulterer is not justified in resisting such attack*; but when the husband has knowledge that his wife is thus living in adultery with another, and connives at and acquiesces in the adulterous connection, he would have no right to kill or inflict serious bodily injury on the adulterer. If you believe from the evidence that defendant, Charley Reed, and Amanda White were living in adultery at the time of the killing, and that Amanda White was at that time the wife of deceased, and that defendant and Amanda White were then and there, at the time of the killing, taken in the actual act of adultery by Frank White, before defendant and Amanda White had separated, and that Frank White then and there made an attack on defendant, *defendant had no right to resist such attack, and an attack made upon defendant under such circumstances does not come within the definition of self-defense.*" We have italicized the objectionable portions of this charge.

Evidently the court must have based this charge upon the converse of the proposition stated in article 567 of the Penal Code,

which declares that "homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated." In other words, the controlling idea intended to be conveyed by the court, according to our construction of the language used, seems to have been, that because the law would justify the husband in taking the life of the adulterer under the circumstances named in the statute, it would follow that the adulterer must submit to the infliction of death thus attempted to be executed upon him, and that he was not even authorized to resist an attack upon his life by the injured husband, much less plead such deadly attack by way of justification or self-defense if in resisting such attack he was compelled to take the life of the injured husband to save his own.

Thus it appears that the court has attempted to make the legal *status* of the defendant depend upon what might or would have been the law with reference to the act of deceased, had the situation of the parties been reversed, and the latter had taken the life of the former. In no possible state of case would such a rule of deduction be a fair or conclusive criterion in the administration of criminal law. The accused is always guilty or innocent from his own stand-point, that is, his personal, individual acts with relation to the matter charged.

Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says: "Self-defense therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide, but care must be taken that resistance does not exceed the bounds of mere defense and prevention; for then the defender would become the aggressor." 2 Cooley's Bl. Com., Book III, chap. 1, p. 44.

But the right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law, regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If however he was in

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the wrong — if he was himself violating or in the act of violating the law — and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong, and its consequences to the extent that they may and should be considered in determining the grade of offense, which but for such acts would never have been occasioned.

Mr. Bishop says: "The rule is commonly stated in the American cases thus — if the individual assaulted, being himself without fault, reasonably apprehends death or serious bodily harm to himself, unless he kills the assailant, the killing is justifiable." 1 Bish. Cr. L., § 865. But a person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself. *State v. Neely*, 20 Iowa, 108; *Adamas v. People*, 47 Ill. 376; *State v. Starr*, 38 Mo. 270. That is, it will not afford him a justification in law. See 2 Cooley's Bl. Com., Book IV, chap. 14, p. 180. How far and to what extent he will be excused or excusable in law, must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and to prevent its commission the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide, and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law.

If we apply this view of the law to the supposed case stated by

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the court in the charge to the jury, which we have quoted above, then the charge is manifestly erroneous. It is erroneous in that it deprives the defendant absolutely of his right of resistance and self-defense. If defendant was taken by deceased in the act of adultery with his wife, and to avenge the wrong deceased made a dangerous or murderous assault upon him, in resisting which he took the life of deceased, under such state of facts defendant would be guilty of manslaughter, because he was committing a misdemeanor which was the cause of and brought about the necessity for the homicide. Adultery, under our statute, is only a misdemeanor, and punishable by fine not less than one hundred nor more than one thousand dollars. Penal Code, arts. 333-336. Carried to its legitimate extent, the charge of the court would make adultery a felony, punishable with summary death, because it would require the defendant to submit to death without an attempt even to defend or preserve his life.

For error in the charge of the court as above discussed, the judgment is reversed and the cause remanded.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

HOUSTON AND T. O. RAILROAD CO. v. CLEMMONS.

(55 Tex. 88.)

Carrier — negligence — contributory — riding in baggage car.

One who is injured by accident while unnecessarily riding in a baggage car, and who would have escaped had he been in a passenger car, cannot recover.*

ACTION for personal injury by negligence. The opinion shows the point. The plaintiff had judgment below.

R. De Armond, for plaintiff in error.

J. D. Woods and *W. W. Wilkins*, for defendant in error.

BONNER, A. J. That the baggage car was a place of more danger ordinarily than the regular passenger coach provided by the company, is a fact well and generally known, and particularly to one who, like the plaintiff Clemmons, was then and had been for

* To same effect, *Penn. R. Co. v. Langdon* (32 Penn. St. 31), 37 Am. Rep. 561.

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years in the employment of railroad companies in running their trains; a part of the time as fireman upon this very road and engine.

It is reasonable to presume, even in the absence of testimony, that the plaintiff knew of this danger and the wholesome regulations of the defendant company forbidding passengers to ride upon its baggage cars.

That plaintiff therefore was guilty of contributory negligence in this case cannot be questioned, as the testimony shows that he would not have been injured had he remained in the passenger coach. *Railroad Co. v. Jones*, 5 Otto, 439; *Railroad Co. v. Lane*, 83 Ill. 548; *Hickey v. Railroad Co.*, 14 Allen, 429. Under well established rules of law, this contributory negligence would exonerate the company for liability, unless the plaintiff brought himself within some exception to these general rules. *Hickey v. Railroad Co.*, 14 Allen, 431.

It is said in this last-named case, that "if sufficient and suitable provision be made within the cars for all the passengers, the managers of the train are not under obligations to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions, with no occasion therefor nor inducement thereto caused by the managers of the road, except a bare license by non-interference or express permission of the conductor, they take the special risks of that permission upon themselves." 14 Allen, 433.

To the same effect is the above case of *Railroad Co. v. Jones*, 5 Otto, 439.

The reason given by the plaintiff for being in the baggage car at the time of the accident was that he had gone there to get water none being otherwise furnished. He himself however states that he had been there about five minutes, and no necessity is shown why he should have remained so long. Although he swears that he was at the time in the baggage car, yet there was testimony tending to prove that he was elsewhere. He admits to have been upon the engine a part of the trip, one witness testifies that he was there ten minutes before the accident, and there is testimony in regard to contradictory evidence given by plaintiff on a former trial, as to his riding upon the engine, tending to impeach his veracity as a witness.

The case as presented to us does not show such satisfactory rea-

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son on the part of the plaintiff as would justify his being, at the time of the accident, at any other than the place provided for the accommodation of passengers, so as to bring him without the general rule of contributory negligence.

Neither does the testimony, as contained in the record, show such gross negligence on the part of the company in the selection of their employees, or that the accident was occasioned by such gross negligence at the time upon the part of these employees, or for the want of proper machinery and appliances, which would authorize the plaintiff to recover on this ground, notwithstanding he may have been guilty of contributory negligence.

We are therefore of opinion that the judgment is not supported by the evidence as applied to the law of the case, and it is accordingly reversed and the cause remanded.

Judgment reversed and remanded.

BINGHAM V. BARLEY.

(35 Tex. 281.)

Infancy — disaffirmance of contract.

One cannot recover land conveyed by him during minority, unless he disaffirms the contract within a reasonable time after majority, * and tenders the consideration received.†

TRESPASS to try title. The opinion shows the points. The defendant had judgment below.

Craig & Garnett, for appellants.

Throckmorton & Brown, for appellee.

QUINAN, J. Com. App. The principal question raised by the assignments of error, and indeed the only question discussed in the briefs of the counsel for the parties in this court is the correctness of the charges of the court.

* To same effect, *Kell v. Healey* (84 Ill. 104), 25 Am. Rep. 434; but see *Gillespie v. Bailey* (12 W. Va. 70), 20 Am. Rep. 445.

† *Green v. Green*, (69 N. Y. 556), 25 Am. Rep. 238.

On the part of the appellant it is contended that they do not properly state the law of the case, and he insists :

1. That where a minor conveys land by deed, it is not necessary on his coming of age to offer to restore the consideration received, in order to a disaffirmance of the contract and a recovery back of the land, but that his reconveyance is a sufficient disaffirmance.

2. That no mere silence or acquiescence for a time short of the period of limitation will bar his right.

The appellant's counsel cites numerous authorities in support of these propositions, and indeed it may be admitted that perhaps the weight of authority is that way. See Wait Act. and Def., title "Infancy," sec. 8, and numerous cases cited.

But we believe that the decisions of our own court settle the rule as to this first proposition clearly the other way, and to our thinking upon sounder principles.

In *Cummings v. Powell*, 8 Tex. 93, speaking of the propriety of an offer to return the purchase-money in this sort of case, where it is sought to rescind the sale, Mr. Justice LIPSCOMB says : "There was no offer on the part of the plaintiffs to restore the purchase-money which they had received from the defendant on the sale. This is the rule under the laws of Spain, and it has received the sanction of the courts of some of the States eminent for their wisdom and authority. It is characterized by honesty, and enforces rectitude of conduct in transactions between individuals, and as a general rule it will be recognized and enforced by this court."

This case is cited and approved by HEMPHILL, Ch. J., in *Kilgore v. Jordan*, 17 Tex. 355, and additional cases referred to.

And in *Stuart v. Baker*, 17 Tex. 421, the court say, "Whatever the conflict may have been in the other courts as to the legal effect of a minor's deed, the doctrine is well and firmly settled in this court, that such deed is not void but only voidable ; * * * it is valid until the infant has avoided it by disaffirming it after arriving at majority ; that it is indispensable to the disaffirmance that the consideration of money for property should be tendered to the purchaser."

In that case the minor after arriving at age had made a deed of the property, which it was insisted was a disaffirmance, but the court held, that "had it gone to show an intention to disaffirm the sale without showing a tender of the purchase-money, it would not have been sufficient to effect the disaffirmance. "

These decisions, it would seem, abundantly sustain the charge of the court upon this point. There doubtless may be exceptions to this general rule, but this case is not one.

The appellant's second proposition, that mere silence or acquiescence for a period of time short of that which would by the law of limitations bar his right to recover the land, will not affect his right to avoid his deed, presents a question of more difficulty. Undoubtedly the rule in regard to the minor's right to disaffirm has been often stated in that way, and it is said to be supported by the weight of authority. But this is where there is "mere silence, without any affirmative act indicating an intention to affirm or tending to mislead the grantee into the belief of such intention, such as standing by and seeing improvements made, or sales of the property to others, without reclaiming the land." *Prout v. Wiley*, 28 Mich. 164.

There are not wanting however abundant authorities to the effect that a silent acquiescence for a considerable time by an infant after arriving at full age is of itself a ratification of his conveyance. 1 Pars. on Cont. 326 ; *Wallace v. Lewis*, 4 Harring. 75 ; *Scott v. Buchanan*, 11 Humph. 468. And it has been frequently asserted that an infant is bound expressly to disaffirm his contract within a reasonable time after coming of age; and that if he neglects to do so, his silence will operate as an affirmation of his contract. See Wait Act. and Def. 143, and the numerous cases cited. What is a reasonable time must be determined in view of the particular circumstances presented in the given case. *Thompson v. Strickland*, 52 Miss. 574.

This express disaffirmance seems, as we have seen, to be contemplated by the decisions in this State. Here the deed of the minor is not void. It is good against all the world but himself or his assignees. If he have received a consideration for it, he cannot disaffirm it without restoring or offering to restore it. His retention of the purchase-money or property may well be considered an affirmative act showing an intention to affirm. And so long silence and acquiescence may furnish conclusive evidence of ratification. It is in relation to the determination of the fact whether there has been a disaffirmance or a ratification that we must judge of the reasonableness of the lapse of time. Evidently the lapse of a few months or even years of silence or non-action might afford but indiffer-ent proof of it. But the time ought not to be measured by

any arbitrary rule. Difference of circumstances would affect the determination of the question. The facts of the present case afford an illustration. Here Elbert Scott, living near by Pegues, to whom he had conveyed the land, looked on for years while Pegues remained in the possession of it; saw him sell the land to others, who again disposed of it to other purchasers, and for nine or ten years made no sign of dissatisfaction and put up no claim to the land. Surely the reasonable assumption from this lapse of time is that he had abandoned all intention of reclaiming the land, and in effect ratified its sale. From 1861 to 1872 was an unreasonable time to slumber upon his rights, if he had any thought of asserting them. And the application of this rule of reasonable time to this case would seem to be a more reasonable rule than any derived from the statute of limitations. The time fixed by the statute is taken in the cases we have referred to, rather as a measure of reasonable time than as an imperative rule. What if there were no law of limitation, or it had been suspended? Would the right of the minor to disaffirm, if he but kept his peace and remained silent, have continued forever?

The doctrine of reasonable time in which to disaffirm commends itself to our judgment. It is not the policy of the laws of this State to extend favor and indulgence to laches. Boys here become men owning and capable of managing property, precociously, and lands increase in value with surprising rapidity, and the country is fast filling up with new settlers seeking homes. Shorter periods of limitation are more needful to the welfare of the people than in other countries of slower growth. To apply the statute as the limit of time upon the minor's right on coming of age to avoid his deed, would unsettle titles, stimulate cupidity, and work only mischief. It could apply only where the land was occupied, and there could be little safety in determining the value of a title unaccompanied by possession. No man could be assured that he owned land unless he lived on it, if perchance his title was derived through a minor's deed, until the law of limitation perfected it through his possession.

We think the proper rule, that most in harmony with the decisions, and our circumstances, in the conflict of authority upon this subject of the rights and duties of the minor, who, after coming of age, would avoid his deed of land made during his minority, is this: that he shall be held to do so within a reasonable time; that

So Belle v. Western Union Telegraph Company.

his silence or acquiescence beyond such reasonable time should conclude him from disaffirming it, and that what is a reasonable time is such a period as in view of the attending facts would rebut any presumption of an intended disaffirmance. The silence or non-claim of the minor for a considerable length of time, though less than the period of limitation for the recovery of lands, may as effectually prove his affirmance or ratification, in connection with the circumstances of the case, as his express acts or declarations to that effect.

Upon the whole case, looking to the charge of the judge in connection with the testimony, while we think it objectionable in failing to explain to the jury what was meant by reasonable time, leaving them to their own unguided conclusions upon the subject, we do not feel warranted in disturbing their verdict. There is no reason to apprehend from the facts of the case that they were misled by it, considering it with reference to the great lapse of time occurring between Elbert Scott's arrival at majority and his reconveyance of the land. The only charge asked by plaintiff upon the subject of reasonable time was that which was given, and the charge asked by him making the period of limitation the test of it was properly refused.

These views embrace all the points brought to our attention by the briefs of counsel, and are conclusive of the disposition of the case.

Upon the whole case, our conclusion is that the judgment ought to be affirmed.

Judgment affirmed.

30 BELLE V. WESTERN UNION TELEGRAPH COMPANY.

(55 Tex. 306.)

Telegraph company — damages — injury to feelings.

A telegraph company is liable for injury to the feelings of a son by willful neglect to deliver to him a message announcing the death of his mother, whereby he was prevented from attending her funeral.*

ACTION of damages for neglect to deliver message. The opinion states the case. The defendant had judgment below.

* *Logan v. W. U. Tel. Co.*, 84 Ill. 468; *Wyman v. Leavitt* (71 Me. 227), 36 Am. Rep. 303, and note, 306.

So Relle v. Western Union Telegraph Company.

Edward Collier, Seth Shephard and C. O. So Relle, for appellant.

Likens & Stewart, for appellee.

WATTS, J. Com. App. The question presented by the record is as to the liability of a telegraph company for injury resulting to the feelings of a person from the willful neglect of the agents of the company to transmit and deliver a message announcing the death of such person's mother, and requesting his presence at the funeral, etc.

This question results from the ruling of the court below in sustaining exceptions to the petition.

The allegations contained in the petition are in effect that appellant's mother died on the 16th day of January, 1874, near the town of Giddings; that on that day, Wm. M. Scallorn, a near relative, prepared the message and delivered the same to the company's agent at said town, to be promptly transmitted and delivered to appellant at Austin; and that the charge for such service was then paid to such agent; that the agents of this company did not transmit and cause such message to be delivered to appellant within a reasonable time, notwithstanding he was in the city of Austin and at his usual place of business; but willfully neglected and failed so to do for several days after the date aforesaid; and that by reason of such willful neglect and failure he was prevented from being present at the funeral services of his mother and providing for her remains being properly cared for, and from paying to her the last tribute of respect, etc.; claiming that he was thereby injured and damaged in the sum of \$50,000.

Actual damages are either general or special; the former is such as naturally result from the act complained of, or which the law implies therefrom, and need not be specially pleaded, but may be recovered under the general averment of damages. 2 Sedg. on Dam. 606.

It appears to be the settled rule of law in this State, that injury to the feelings, caused by the willful neglect or fault of another, constitutes such actual damages for which a recovery may be had. *Hays v. H. & G. N. R. R. Co.*, 46 Tex. 279; *H. & G. N. R. R. Co. v. Randall*, 50 id. 261.

In the last edition of *Shearman & Redfield on Negligence*, after fully considering the measure of damages, etc., in telegraph cases,

So Relle v. Western Union Telegraph Company.

the authors give it as their opinion, that "in case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages.

"Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages."

It appears to us that the natural consequence of a failure to promptly transmit and deliver a message like that in this case, and under the circumstances shown in appellant's petition, is to produce the keenest sense of grief incident to a disappointment. For it is a principle of our nature, implanted in the bosom of every reasonable being not devoid of human sensibilities, to promptly pay the last tribute of respect to the mother who bore and fostered us. And to be thwarted in the discharge of this duty, prompted as it is by natural desire, by the willful fault or neglect of one whose business it is to communicate the news, and who has received his compensation therefor, in the very nature of things is calculated to, and will inflict upon the mind the sorest sum of disappointment and sorrow. This being the natural result of such neglect, the damages resulting therefrom are general, as contradistinguished from special damages, and may be recovered under the general averment of damages.

In the case of *Phillips v. Hoyle*, 4 Gray, 568, it was held that injury to the feeling of a parent in consequence of the seduction of his daughter constitute general damages naturally resulting from the act, and need not be specially pleaded. A similar doctrine is asserted by the Supreme Court of the United States, in the case of *Roberts v. Graham*, 6 Wall. 578.

This being the natural result of such neglect, must be held to have been contemplated by the company when its agent received the message, and agreed for a compensation then paid to promptly transmit and cause the same to be delivered. For all the importance that the message imports is fairly shown in its terms.

Telegraph companies exercise and enjoy special franchises and privileges under the law ; the very purpose of their organization is to furnish for compensation the means of rapid and prompt com-

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munication ; its use is expensive, and is rarely resorted to except in matters of importance to the parties. Hence the resort to this mode of transmitting information should of itself be held sufficient notice to the company's agents, that as between the sender and the party to whom sent, the message is deemed to be of some importance, unless the contrary is made known by strict information or strong implication, as time is the usual consideration that prompts parties to the use of the wire.

The law will not permit any one to impose with impunity upon another, by his willful fault or neglect, such injury to his feelings as is the natural result from the disappointment shown by the allegations of appellant's petition and then protect himself under the plea of *damnum absque injuria*.

Injury to the feelings, resulting from such disappointment, in our opinion constitute general damages, recoverable under a general averment of damage ; and the court erred in sustaining the exceptions to appellant's petition.

It should be remarked that great caution ought to be observed in the trial of cases like this ; as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company ; for it is only the latter for which a recovery may be had ; and the attention of juries might well be called to that fact.

It is our conclusion that the proper disposition of this appeal is to reverse the judgment and remand the case.

Reversed and remanded.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY V. BURKE.

(55 Tex. 323.)

Damages — evidence — measure — family portrait.

Evidence of family tradition as to the cost of family paintings is incompetent to show their market value.

In an action for loss of a family portrait, the original cost and the probable expense of reproduction may be considered in estimating the damages.*

*See 25 Alb. Law Jour. 144.

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ACTION of damages for loss of goods. The opinion states the case. The plaintiff had judgment below.

Walton, Green & Hill, and George Goldthwaite, for appellant.

John B. Rector, for appellee.

GOULD, A. J. This suit was instituted by Mrs. V. C. Burke, September 13, 1880, to recover of the railway company damages for the loss and destruction of certain paintings, jewelry, clothing, furniture and household effects, shipped by her at New Orleans, La., to be carried to Austin, Texas, under a contract made at New Orleans with a connecting line and agent of the appellant railway company, by the terms of which the latter agreed to carry said property from Houston, Harris county, to Austin. The property shipped was stated in detail, with values aggregating as follows: Paintings, \$8,510; jewelry, \$2,320; clothing, \$6,081; furniture, household effects, etc., \$11,492.50. Total, \$28,403.50.

[Omitting other inquiries.]

We propose to consider first, defendant's 14th assignment of error, presenting the proposition that evidence of G. B. Burke as to the cost of pictures should have been withdrawn from the jury when it transpired that the same was hearsay.

In plaintiff's bill of particulars of articles lost are the following articles, viz.:

Child and Dog, by Inman.....	\$1,500
Three portraits, by Sully, at \$1,000 each.....	3,000
Group of children, by Beard and Moise.....	1,000
Portrait, by Fowler.....	500

It appears that these were family portraits and paintings by distinguished artists, and there was considerable evidence bearing on the question of their value. Mr. G. B. Burke, a son of plaintiff's deceased husband, Glendy Burke, testified that each of those paintings named above, except the last, cost \$1,000, and that the last, a portrait of Glendy Burke, by Fowler, cost \$500. On cross-examination it was developed that he had no personal knowledge of the cost, but had learned of it from his father and traditions in the family. We think that this was hearsay testimony, and that the court should have sustained the motion to exclude it. Appellee re-

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plies that there was sufficient competent evidence before the jury to warrant the verdict, and that the admission of improper evidence, cumulative in its nature, will not authorize a reversal of the judgment. The testimony of Mrs. Burke, and of artists of eminence in New York, tends to show that as works of art, the market value of these paintings in New York, or at a point where such works of art can be said to have a market value, was fully as great as the cost price affixed by G. B. Burke. On the other hand, the testimony of Moise, an artist, tends to fix their cost at prices considerably less. In its charge the court gave the jury as the standard of value of the articles lost, their market value at Austin; and if any of the articles had no market value at Austin, and yet had a market value at other places, that value at the nearest place to Austin where it existed was made the standard. The court also charged, "In determining the value of family portraits, which have no market value, if you find such to have been lost, you may look to the original cost of the same, and to the probable cost of reproducing or replacing the same, as shown by the testimony." In view of the prominence given in this charge to the question of original cost, we are unable to see that evidence as to such cost is merely cumulative of other evidence as to value. The verdict of the jury is general, and does not show what value they affixed to the pictures; nor can we know how far they were influenced in valuing them by the evidence of Mr. Burke as to their cost. "A party has a right to have none but legal evidence submitted to a jury. And where that which is irrelevant" (or hearsay) "has been admitted against the objections of the party, if it may have had an improper influence upon the jury it will require a reversal of the judgment." *Waul v. Hardie*, 17 Tex. 553. In our opinion this error is fatal to the judgment.

[Minor matters omitted.]

We have seen that the charge of the court made the market value of the articles lost the measure of damages, but added a clause as follows: "In determining the value of the family portraits, which have no market value, if you find such to have been lost, you may look to the original cost of the same, and to the probable cost of reproducing and replacing the same as shown by the testimony." The measure of damages allowed in this clause of the charge is objected to, but the brief does not inform us of the grounds of objection or the precise legal question intended to be

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made. That part of the charge is in accordance with the rule recently laid down by the Supreme Court of Massachusetts. *Green v. Boston & Lowell R. Co.*, 128 Mass. 221; s. c., 35 Am. Rep. 370.

In regard to a family portrait which might be reproduced, the artist and the subject both being still accessible, it is not perceived why the owner would not be entitled to supply the lost portrait, and to recover of the carrier the cost. This is said to be the owner's right in case of lost articles generally. *O'Hanlan v. G. W. R'y Co.*, 6 Best & Smith, 493 (118 Eng. Com. Law, 491); Wood's *Mayne on Damages*, 401. But when it is impracticable to replace the painting, and where the original cost was incurred at a time long past, and under circumstances differing widely from those affecting the present value, the charge given would be of doubtful applicability, and at all events should be better qualified or explained so as to guard the jury against making the first cost and the cost of replacing the exclusive measure of value. We do not understand the plaintiff as claiming, or the charge of the court as allowing, damages because of the peculiar value attached by the owner to the portraits, the "*pretium affectionis*," as it is styled. The claim of the plaintiff seems to be, that as works of art, paintings by artists of established reputation, of subjects calculated to give those paintings value in the eyes of those who buy such works of art, the lost portraits had a value, aside from any peculiar value for family reasons. As bearing on this claim we cannot say that the charge given was erroneous, although we think it would have been better adapted to the case had it been qualified or explained.

For the reasons heretofore given the judgment is reversed and the cause remanded.

Reversed and remanded.

Cunningham v. Moore.

CUNNINGHAM V. MOORE.

(55 Tex. 373.)

Negligence — respondeat superior.

Lessees of a penitentiary are not responsible for an injury to a convict by the defective construction of a bunk made by a servant of the penitentiary commissioners having charge of the convicts.*

ACTION for death by negligence. The opinion and head-note show the facts. The plaintiff had judgment below.

Crawfords & Smith, for appellants.

Geo. S. Vaughan, Dan. T. Leary and R. D. Harrell, for appellees.

BONNER, A. J. Under the view we take of this case, it does not become necessary to decide, whether to the misfortune of the surviving relatives of the deceased, Spencer C. Moore, that he was a convict, shall be added the loss of the right to sue for damages resulting from his death, were they otherwise entitled thereto.

It was the evident intention and wise policy of the legislation in regard to our penitentiary system, that the State should by officers of its own selection retain an immediate and direct supervision and control over the convicts. The very statute under which this lease was made expressly provided that the governor should appoint three commissioners, who in conjunction with him were to "take such measures, and adopt such rules and regulations in the control and management of the penitentiary, and the convicts belonging thereto, as should be deemed best, not inconsistent with the laws prescribing the treatment and management of convicts; and such rules and regulations shall be binding upon all officers of the penitentiary, guards, employees, hirers of convict labor, and all others in any way connected with the penitentiary, or the convicts within or without the walls." * * *

It is further provided that * * * "no lease shall be made by which the control of the prisoners, except as to a reasonable amount of labor, shall pass from the State or its officers to the lessees; and the State shall in all cases, and under all circumstances, retain the absolute control of the persons of the convicts, put them

* See *Clodfelter v. State*, 55 N. C. 51.

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to or withdraw them from any kind of labor ; station and remove them at or from any point inside or outside the prison ; make or change at pleasure all rules for the discipline and punishment of convicts ; prescribe regulations for their food, clothing, nursing, instruction and guarding ; and any lease made shall be subject to the reservation of these rights and powers on the part of the State, whether so stated in the lease or not ; the object of these limitations being to prevent the State, under the guise of contract, from parting with the right to direct how, at any time and under all circumstances, convicts shall be lodged, fed, clothed, worked and treated." * * * Gen'l Laws 15th Leg., 194-5, §§ 6 and 7 ; R. S., art. 3572.

The undisputed testimony shows, that in pursuance of this power J. T. Echols was appointed by the commissioners sergeant in charge of the convict camp to which the deceased Moore belonged ; that under his supervision, and by direction of one of the commissioners, the bunks in question were constructed ; that when the convicts were turned in at night, they and the prison house were under the exclusive control of the sergeant ; and that the lessees had no right to order those convicts off the bunk, by whose weight it was broken down.

It is a well settled principle, founded on reason and supported by abundant authority, that the relation and liability of master depends upon the right of control over the servant. *Cunningham v. Railroad Co.*, 51 Tex. 510 ; s. c., 32 Am. Rep. 632, and authorities cited.

Applying this rule to the facts in evidence, Cunningham and Ellis were not responsible either for the construction of the bunks or for the imprudent act of the convicts which occasioned the injury.

It may be added that the uncontradicted testimony further shows, that had it not been for the contributory fault of the deceased, he would not have been injured ; and besides according to the great weight of the evidence, the bunks were reasonably well constructed for the legitimate purposes for which they were made.

The learned judge presiding charged the law of the case, but the verdict of the jury was both unsupported by and against the evidence, and the motion for a new trial should have been granted. For the error in overruling it, the judgment is reversed and the cause remanded.

Reversed and remanded.

MILLER V. MORRIS.

(35 Tex. 412.)

Landlord and tenant—covenant to restore—fire.

A covenant by lessees to restore the premises "in as good condition as when delivered to them, that is to say in good running order, ordinary wear and tear excepted," does not bind them to rebuild in case of casual destruction by fire, nor render them liable for such loss.*

ACTION under lease to recover value of property consumed by fire. The opinion states the point. The defendant had judgment below.

T. J. Williams and Possey, Bussey & Hennisberger, for appellants.

Greenwood & Gooch, for appellees.

BONNER, A. J. Appellants pretermit in their brief the second and fifth assigned errors.

[Omitting minor points.]

III. The seventh assigned error, and which presents the main question in the case, is :

"That the court erred in construing the instrument sued on as containing no covenant or agreement on the part of the defendants to replace and rebuild said property, and to restore the same to plaintiffs in good running order at the expiration of said lease in case it was destroyed, or in default thereof, to pay plaintiffs the value thereof and damages thereto; and in ruling the law to be, and in instructing the jury, that the suit was brought by the plaintiffs to recover damages of the defendants for culpable negligence of defendants in the destruction of said property, when in fact said suit was brought as well to recover on the covenant and agreement of defendants to replace and to rebuild, and to deliver said property to plaintiffs in good running order."

We have no statute of waste in this State, and under the common law, as adopted by us, the defendants below, under the facts as found by the jury, would not be liable to rebuild, unless the covenant in the lease is equivalent to an express agreement to that

* See *Hoy v. Holt* (31 Penn. St. 38), 36 Am. Rep. 659; *Whitaker v. Hawley* (25 Kans. 674), 37 Am. Rep. 277, and note, 383.

effect. 2 Minor's Inst. (2d ed.), 546; *Warner v. Hitchins*, 5 Barb. 666.

The covenant is, that "the said Morris, Ragsdale & Simpson agree to give the said Miller, Billups & Co. peaceable possession of the said shops, oxen, wagon, houses, mill and gin in as good condition as when delivered to them; that is to say, in good running order, ordinary wear and tear excepted."

The importance of the question will justify a brief review of some of the leading authorities upon this subject, to aid us in arriving at a proper construction of this covenant.

In *Nave v. Berry*, 22 Ala. 391, the distinction was recognized and adopted, between an obligation "to repair and deliver up," and one "to deliver up," that whilst the former binds the obligor to rebuild in case of loss by fire during the term (*Phillips v. Stevens*, 16 Mass. 238), the latter is construed to mean simply an obligation against holding over; and if the buildings are burned or destroyed without the fault of the lessee, he is not bound to rebuild or pay for the improvements so destroyed.

In *Maggort v. Hansbarger*, 8 Leigh, 536, the covenant was "to return the said property with all its appurtenances." The property was destroyed by fire. *Held*, that this was not a covenant to rebuild or to deliver the demised premises in good order, but simply a covenant or agreement to return the property with its appurtenances. A distinction was drawn between that case and *Ross v. Overton*, 3 Call, 309; *Phillips v. Stevens*, 16 Mass. 238; *Bullock v. Dommit*, 6 Tenn. 650; *Digby v. Atkinson*, 4 Camp. 275, and others of like character, in which there was an express covenant to repair. The learned judge in delivering the opinion said that "even when there were such express covenants to repair, it has seemed to some a strained and doubtful construction to extend them to the case of rebuilding."

In *Wainscott v. Silvers*, 13 Ind. 500, the rule is stated that the tenant is not responsible for buildings accidentally burned down during his tenancy, unless he has expressly covenanted or agreed to repair. That it is not sufficient to charge him that he agreed or covenanted to surrender the premises at the end of his term, in the same repair or condition that they were in at the time of the contract.

In *Warner v. Hitchins*, the covenant was to surrender up the possession of the premises, at the expiration of the lease, in the

same condition they were in at the date of the lease, natural wear and tear excepted. The building was destroyed by fire. In an elaborate opinion the leading cases in both England and this country were reviewed, and it was held that the covenant did not amount to one to repair, and that the tenants were not bound to rebuild. 5 Barb. 666; *McIntosh v. Lown*, 49 Barb., 554.

In *Howeth v. Anderson*, 25 Tex. 557, the covenant was to redeliver said mills, etc., to said Anderson, in as good order as they received them, excepting usual wear and tear and unavoidable accidents. In the opinion, WHEELER, C. J., cites with high commendation the above case of *Warner v. Hitchins*, 5 Barb. 666, and also quotes from Mr. Taylor's work on Landlord and Tenant (§ 357) as follows: * * * "Where he (the lessee) covenants to surrender the premises at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but without any covenant to repair or build, he is not bound, in case the buildings are destroyed by fire during the continuance of the term, to put up new buildings in the place of those destroyed." In that case the learned chief justice reached the conclusion, that according to the authorities cited, it was clear that the defendants were not liable for the accidental loss of the premises by fire; that such lease was not like the contract of a carrier, nor governed in its construction to the same extent by considerations of public policy; that the construction should be given which would most accord with the presumed intention of the parties; and that from the terms and subject-matter of the contract, it was not reasonable or fair to conclude that the parties contemplated that the lessees were to become insurers against those casualties which ordinary prudence and foresight could not have guarded. 25 Tex. 572-3; *Trigg v. Hally*, 4 Humph. 493; *Maggort v. Hansbarger*, 8 Leigh, 537; *Graham v. Swearingin*, 9 Yerg. 276; *Harris v. Nicholas*, 4 Mun. 483; *Townsend v. Hill*, 18 Tex. 426.

Levey v. Dyess, 51 Miss. 501, is a case almost identical with the present. That covenant was, that "at the expiration of twelve months, the lessees were to redeliver to the lessor the steam saw-mill, together with said implements and tenements, and two log carts; the said steam saw-mill in good running order, except the usual wear and tear, and the log carts, implements and tenements without damage, except the running, wear and usage."

The breach assigned was non-delivery at the expiration of the

lease. To which the defendants pleaded the casual destruction of the property by fire, without their act, fault or negligence. To this plea a demurrer was sustained. After an elaborate and learned opinion by SIMRELL, J., in which many of the leading cases were reviewed, the court deduced from the authorities the following propositions :

1. That the lessee was not responsible to the lessor for the accidental casual destruction by fire of the property demised, unless by his covenants he has made himself so.

2. In construing the covenants, the cardinal rule is the intention of the parties ; and the courts will not extend or enlarge the obligations of the lessee beyond the plain meaning and intention of the parties. If there is not an express stipulation to restore edifices and structures destroyed by casualty, or some covenant which is equivalent thereto, such as a covenant "to uphold and repair," or "to repair," then the loss must fall upon the reversioner. * * *

3. A covenant to redeliver or restore to the lessor, in the same plight and condition, usual wear and tear excepted (or other words of like import), does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss upon him.

4. The contemplation of the parties to such a covenant, applied to a house, saw-mill, machinery and appliances, is that the lessee will take ordinary reasonable care of the property, according to its nature, and that he will surrender possession when his right to enjoy has expired. That it is not within the intendment and according to general understanding, that such stipulation imposes on the tenant the responsibility of insurer. If that greater risk is assumed, it must be clearly and explicitly set forth in the contract. * * *

We indorse these propositions as sound both on principle and authority.

Construed in the light of the above authorities, the covenant under consideration did not bind the defendants to rebuild in case of casual destruction of the property by fire, or impose the burden of the loss on them, the jury having found that the fire was not occasioned by their negligence. Hence it would follow that the seventh assigned error is not well taken.

This view of the case dispenses with the further consideration of the other errors assigned.

Judgment affirmed.

MC CREARY v. GAINES.

(55 Tex. 485.)

Agency — factor — pledge.

A factor has no power to pledge his principal's goods.

ACTION to recover value of personal property. The opinion states the case. The plaintiff had judgment below.

Mabry & Carpenter, for appellants.

John D. Templeton, for appellee.

STAYTON, A. J. This suit was brought by the appellee against the appellants to recover one piano and three organs, or their value.

Plaintiff alleged that he had placed the property sued for with Henry Miller, for sale upon commission, and that he was advised that Miller had pledged the same to appellants to secure the payment of a sum of money borrowed by Miller from the appellants, for his own use; and he further alleged that at the same time, Miller for the same purpose, pledged to appellants property of his own of a like kind as that sued for, which was of value sufficient to fully satisfy the debt due from Miller to appellants.

He further alleged upon information, that the sum borrowed from appellants was \$600, and that the property of Miller pledged therefor was of the value of \$2,715; and prayed that in the event the property of himself was in any manner found liable for the debt due from Miller to appellants, the property owned by Miller be first subjected to the payment of that debt.

The appellants pleaded a general denial, and that they purchased the property sued for, in ignorance of the fact that the appellee was the owner thereof, from Miller, for a valuable consideration paid, believing Miller to be the owner thereof. They did not allege the pledge nor set out the loan of money.

After the appellants had fully answered, they filed what was denominated by them a "supplemental answer," which consisted of special exceptions to the petitions of appellee, which upon motion was stricken out because not filed in due order of pleading. In this there was no error, for the appellants had already answered by a general demurrer and to the merits, and their special exceptions

were not filed in due order of pleading ; besides it is not seen that the exceptions could have been sustained if they had been filed at the proper time.

The evidence showed that Miller was a dealer in musical instruments such as are sued for ; that he lived and did business in Fort Worth, Texas ; that he received from the appellee, who resided in Dallas, Texas, the piano and organs sued for, under an agreement to sell them for him upon commission at prices named, and that the property when received was by Miller put in his store at Fort Worth, among other goods of his own of a like character, for sale in the ordinary course of business. There was no controversy as to the ownership of the property being in the appellee at the time the same was delivered to Miller for sale.

The evidence further showed, that after Miller received the property he borrowed money from the appellants — how much does not appear ; and that to secure the payment of the same, he pledged to them the property of the appellee, and also property of a like character which belonged to himself ; the nature of the latter did not appear.

There was no evidence showing that the appellants knew that the property sued for belonged to the appellee, nor that they made inquiry in regard thereto. The money borrowed by Miller from the appellants had not been paid.

The cause was tried without a jury, and a judgment rendered for the appellee for the instruments or their value, the separate value of three of the instruments being determined, and the aggregate value of all, by the judgment.

The second assignment of error is that “ the court erred in not rendering judgment for the appellants.”

The proposition under this assignment is, in effect, that Miller under the facts was authorized to pledge the property of his principal, and this is the main question in the case.

How far the court may have been influenced in rendering the judgment by the fact that no inquiry was made by the appellants as to the true ownership of the property, we are uninformed ; but under the facts of the case, it was more incumbent upon them to do so than in ordinary cases ; the pledge was not made in the ordinary course of business, but the pledgor was by the act of pledging withdrawing from the business a part of the property which he held for ordinary sale ; how large a part does not appear, nor for how long it

was expected to be withdrawn. Such surely was not in accordance with the ordinary custom of merchants, and it was in itself perhaps a fact that should have aroused inquiry as to the status of the property and the relation of the pledgor thereto.

It would seem that it was incumbent upon the appellants to have shown upon the trial how much money they loaned to Miller, and the value of the property which belonged to Miller, which they hold to secure the payment of the same; for if that property was of value sufficient to pay their debts, they could have had, under no state of facts, either a legal or equitable right to hold the property of the appellee to pay that debt. These facts were within their knowledge, and proof in regard thereto would be expected of them under the pleadings; but notwithstanding one of the appellants was a witness in the case, he was silent in regard to these matters when he ought to have spoken.

Under such facts the court may have concluded that they had no rights, even if Miller had the power to pledge, which a court was called upon to protect, and we are not prepared to say that such a finding would have been erroneous.

If however the finding of the court was based upon the want of power in Miller to make the pledge (and we cannot say that this was not the basis of the finding), then it is necessary to consider that question.

We have no statute upon the subject now to be considered, unless article 2368 of the Revised Statutes has a bearing upon the subject. It in substance provides that no factor shall directly or indirectly acquire or purchase any interest in property consigned to him, unless by express license from the owner.

This act was most probably intended to prevent simulated sales, by and through which a factor might seek to acquire an interest in the property confided to him for sale, and was not intended as a statutory declaration of his want of power to pledge the property of his principal for the debts of himself. The spirit of the statute might however extend to a declaration of the want of power in a factor to dispose of the property of his principal by sale, mortgage or pledge, in any manner by which he might receive a benefit, other than that contemplated by his principal. Regarding the question as unaffected by any statute, the common law must furnish "the rule of decision" in this case. R. S. 3128.

It does not appear that any act was done by the appellee to mis-

lead the appellants, and to cause them to believe that Miller was the owner of the property, unless the delivery of the possession thereof to him, and empowering him to sell the same, can be held in law to have had that effect.

The relation of principal and factor carries with it to the factor the possession of the property and the power to sell it; if either of these elements are wanting, the relation of principal and factor does not exist, and the possession must be referred to some other class of bailment, and the power to sell to some other class of agency.

It is not believed that at common law the simple facts of possession and power of sale have ever been held sufficient *indicia* of ownership in a factor to authorize a third person to take the property so held, in pledge for the debt of the factor.

The law is thus stated by an elementary writer: "At common law it was held that an agent authorized to sell goods could not, although the apparent owner thereof by permission of his principal, pledge the same by delivering to a person either the goods themselves or any document of title relating thereto." Chit. on Con. 204.

Another elementary writer says: "An authority to an agent to sell does not authorize him to exchange them in barter, or to pledge them; for there is no usage of trade to that extent;" and again, "The doctrine of the want of authority of a factor to pledge the goods of his principal is now well settled, although it has been greatly doubted at different times." Story on Agency, 78.

This doctrine is well and firmly established in England. *Patterson v. Task*, 2 Str. 1178; *Daubigny v. Duval*, 5 T. R. 604; *Martini v. Coles*, 1 M. & S. 140. In the case of *Quiroz v. Trueman*, 3 Barn. & Cress. 348, the doctrine was commended by all the judges sitting, and it was therein held that the fact that the principal had requested the factor to make remittances in anticipation of sales of the property consigned did not give the power to pledge.

In the case of *Graham v. Dyster*, 2 Stark. 21, it was held that sending goods to a factor for sale, and drawing upon him for the value of the property consigned, did not authorize him to pledge the goods even to raise funds to meet the bills.

In *DeBouchout v. Goldemid*, 5 Vesey, 210, Lord Chancellor LOUGHBOROUGH said: "It has been settled with regard to goods; and there is no doubt that if goods are consigned to a factor to sell, he cannot pledge them. It must be a *bona fide* sale for valuable con-

sideration. I am not apprised of the late cases, but I had taken it to be a pretty clear principle. The defendants are certainly wrong in point of law; I take it not merely to be a principle of the law of England, but by the civil law, that if a person is acting *ex mandato*, those dealing with him must look to his mandate."

If further evidence of the establishment and existence of this rule of the common law in England was needed, it is to be found in the legislation of that country in what are known as the "Factors' Acts," beginning in the year 1823, and by several intervening acts, ultimating in the act passed in the year 1877, by which changes have been made from the common-law rule to meet the various phases thereof which had been felt to operate harshly upon the commercial interests of that country and its people. The substance of these several acts, and the constructions placed upon them by the courts of that country, will be found in the recent work of Mr. Evans (Ewell's Evans on Agency, 542 *et seq.*), and by an examination of the same it will be seen that each of said acts has in some respect changed the common-law rule.

In each of the States of the United States in which the common law has been adopted, the common-law rule is in force, except in so far as the same has been changed by statute. Story on Agency, 113. An examination of the cases in the several States upon this subject would require more time and space than we can now give to that subject.

The general rule is thus stated by Chancellor Kent: "To pledge the goods of the principal is beyond the scope of the factor's power; and every attempt to do it under color of sale is tortious and void. If the person will call for the letters of advice, or make due inquiry as to the source from which the goods came, he can discover (say the cases) that the possessor held the goods as factor and not as vendee; and he is bound to know at his peril the extent of the factor's power." 2 Kent Com. 625.

The case of *Kinder v. Shaw*, 2 Mass. 398, was in its facts very similar to the case now under consideration. It was an action of *trover*, brought to recover goods placed by the plaintiff in the custody of Carter, who kept a retail shop, under an agreement between them that Carter should sell them and receive for his services a stipulated commission on sales. After Carter received the goods, having need for a loan of money, he borrowed the same from the defendant, and to secure its payment pledged the goods of the

McCreary v. Gaines.

plaintiff, together with goods of his own. In that case as in this, it was contended as Carter was not a known factor, and the goods of the plaintiff were placed in the store of Carter among his own, and openly exposed for sale, that the apparent ownership thus given would make a pledge of the goods binding upon the plaintiff when made to a person who did not know for what purpose the factor held them. PARSONS, C. J., rendered the opinion in the case, and "observed that the court considering the question of importance to the mercantile part of the community, had looked into the case with attention, and were all of opinion that a factor has no authority to pawn goods which have been intrusted to him for sale. The rights of the principal and factor depend on the law merchant, which has been adopted by the common law. By this law a factor is but the attorney of his principal, and he is bound to pursue the powers delegated to him."

The same principles are announced in the case of *Laussatt v. Lippincott*, 6 S. & R. 391 (9 Am. Dec. 440), by TILGHMAN, C. J., where the reasons of the rule are clearly set forth.

In the case of *Hutchinson v. Bours*, 6 Cal. 385, which was a case based upon facts very similar to those of the case now under consideration, a different conclusion was arrived at, but that decision seems to have been founded upon a statute in force in that State.

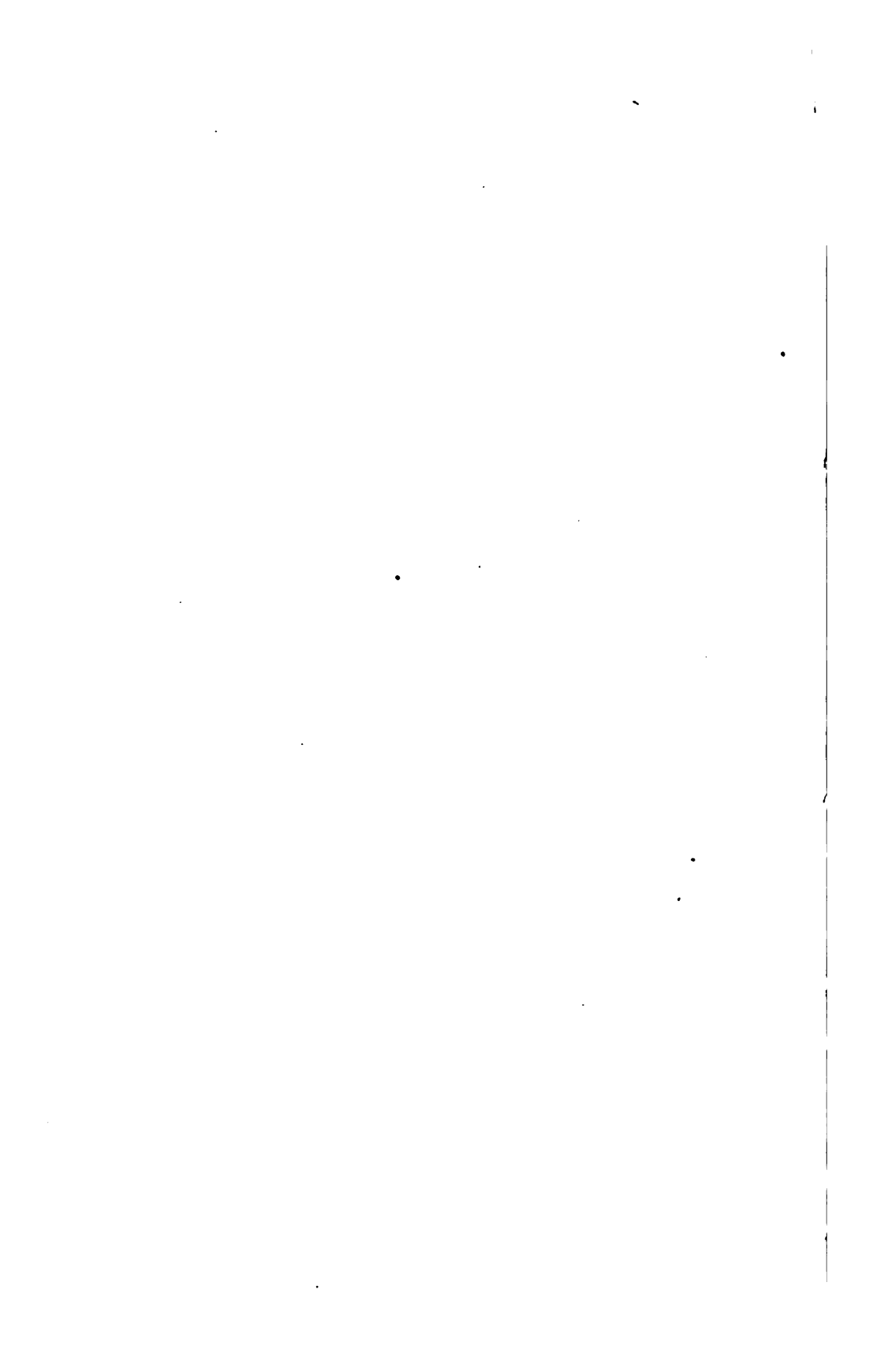
We conclude that under the facts of this case, Miller had no power to pledge the goods of the appellee; that so the law is. If it be true that the good of commerce, or the due protection of persons who deal with factors in good faith, requires a different rule, it rests with the legislature to afford it, as has been done in England and in most of the other States, and not with the courts.

The court did not err in refusing to grant a new trial, nor in rendering an alternative judgment for the aggregate value of the property.

Each of the instruments except one are valued in the judgment; the aggregate value of all is therein given, from which the value of the one not separately valued can be arrived at as certainly as though valued in the judgment.

There being no error in the judgment, it is affirmed.

Affirmed.



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ABATEMENT.

Penal action — personal liability of officer.] A statute providing that officers of certain corporations shall be personally liable for the debts of such corporations in case they neglect to file an annual certificate of their condition is penal, and an action brought to enforce such liability does not survive. *Mitchell v. Hotchkiss* (Conn.), 146.

ACCOMPLICE.

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See DEED, 198, 740; LIMITATION, 97, 157, 830, 657.

ACTION.

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For private breach of municipal duty.] *See* NEGLIGENCE, 457.

Recovery over.] *See* MUNICIPAL CORPORATION, 430.

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On estate of living person.] *See* JURISDICTION, 12.

ADULTERY.

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ADVANCEMENT.

Deed to child's husband — money paid as surety for him.] A deed of lands by a father to his daughter's husband is not presumed an advancement to the daughter, and so of money paid by the father as surety for the husband. *Rains v. Hays* (La), 39.

AGENCY.

1. Factor — pledge.] A factor has no power to pledge his principal's goods. *McCreary v. Gaines* (Tex.), 818.

AGENCY — *Continued.*

2. **Sale**—*memorandum signed by agent — evidence.*] A memorandum of sale was written by the vendor in his book, and signed by him, and by the purchaser's agent in his own name. *Held* a valid contract, not to be varied by parol. *Wiener v. Whipple* (Wis.), 775.
3. **Undisclosed principal**—*election.*] Where one sells goods to another, who informs him that he is buying as agent for a third, but does not disclose his principal's name, and the seller does not require the name, nor know who the principal is, but takes the agent's note for the price, he may still elect to hold the principal. *Merrill v. Kenyon* (Conn.), 174.
- See* ANIMAL, 448; BANK, 261; CONTRACT, 152; CUSTOM, 662; DEED, 592
NEGOTIABLE INSTRUMENT, 624; PENSION, 356.

ANIMAL.

Negligence—*notice of viciousness — agency.*] The defendant was accustomed personally to tie his watch dogs by day and loose them at night. Having overslept one morning and neglected to tie the dogs they bit the plaintiff, who came lawfully on the premises by the invitation of the defendant's daughter. *Held*, that the defendant's knowledge of the dangerous character of the dogs might be inferred from his habit of tying them by day; but not from his wife's asking the daughter why she had not tied them. *Goode v. Martin* (Md.), 448.

Larceny of dog.] *See* CRIMINAL LAW, 81.

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See DEED, 617.

APPURTENANCES.

Mill-dam.] *See* DEED, 377.

Sewer pipes.] *See* DEED, 581.

ARBITRATION AND AWARD.

Misconduct of arbitrator.] It is sufficient ground for setting aside an award that one of the three arbitrators, after his appointment, conversed fully, on the merits of the dispute with one who had previously acted as arbitrator in respect to the same matters and whose award had been set aside. *Moshier v. Shear* (Ill.), 573.

ASSAULT AND BATTERY.

Exemplary damages for.] *See* DAMAGES, 548.

ASSIGNMENT.

Of part of chose in action.] An assignment of part of a chose in action is valid. *Exchange Bank v. McLoon* (Mo.), 388.

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ATTEMPT.

See CRIMINAL LAW, 658.

ATTORNEY.

Disbarment — libel on judge.] Attorneys, who were also editors of a newspaper, published in their newspaper a libellous article, charging a judge with prostituting the machinery of justice to serve party purposes in a certain case. Thereupon proceedings for disbarment were instituted against them, and they were disbarred for misbehavior in office. *Held* error. *Ex parte Steinman* (Penn.), 687.

BAILMENT.

Lien — for repairs — extent of.] Under a contract for repairing several articles for a gross sum, the person repairing has a lien on all the articles for the repairs on any. *Hensel v. Noble* (Penn.), 650.

BANK.

1. **Agency for collection — sub-agency.]** Bank A. indorsed and transmitted to bank B., for collection on its account, a check which it owned. Bank B. indorsed and transmitted it for collection to bank C. with directions to credit bank B. with the proceeds. Bank B. on the same day failed, in debt to bank A. Bank C. collected the check and credited the proceeds to bank B., which was in debt to bank C. Before the collection the cashier of bank C. had heard of bank B.'s failure but did not notify the drawee, who had no notice. The bank examiner, without the knowledge or consent of bank A., credited bank A. and charged bank C. with the amount on the books of bank B. *Held*, that bank A. could recover the amount of bank C. *First National Bank of Crown Point v. First National Bank of Richmond* (Ind.), 261.
2. **Deposit in trust — notice.]** A village treasurer borrowed money of a bank on his own note, with his own securities as collateral, professing to make the loan for the village, and to anticipate the collection of taxes, and the money was deposited in the bank to his credit as treasurer. Most of the fund was paid out upon the village warrants, and the treasurer, after the tax money came in, drew his check upon the fund to pay the note and redeem the collaterals. *Held* valid as against the village, although the treasurer proved a defaulter. *Fifth National Bank v. Village of Hyde Park* (Ill.), 218.
3. **Estoppel as to depositor's title.]** A bank that has received money from a customer and credited it to him on its books may not be heard subsequently to allege that the deposit belonged to some one else. *First National Bank of Lock Haven v. Mason* (Penn.), 632.
4. **Surety — agreement to apply principal's deposit to his debt.]** In an action by a bank against sureties on a promissory note discounted by it, it is no defense that before maturity the principal directed the bank to pay the note at maturity out of his general deposit in the bank, that the bank failed to do so, and subsequently allowed the principal to check the money

BANK — *Continued.*

out of the bank, although it knew of the suretyship at all times, and the deposit was sufficient to pay the note. *Second National Bank of Lafayette v. Hill* (Ind.), 239.

See NEGOTIABLE INSTRUMENT, 133.

BANKRUPTCY.

1. *Conveyance in contemplation of.*] A conveyance of real estate to a purchaser in good faith and for value by one contemplating bankruptcy and afterward becoming bankrupt, is valid as against a purchaser from the assignee. *Wiegels v. Thomsen* (Ill.), 571.
2. *"Fiduciary character" — gratuitous bailee.*] One receiving money from another, gratuitously to purchase exchange, and remit to a third, acts in a "fiduciary character," within the Bankrupt Act, and is not relieved by his discharge in bankruptcy. *Herman v. Lynch* (Kan.), 330.

See USURY, 41.

BAR.

See CRIMINAL LAW, 53; JUDGMENT, 205; SURETY, 634.

BEQUEST.

See MARRIAGE, 187; WILL.

BET.

See WAGER, 110.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENT.

BOND.

See INTEREST, 360.

BOUNDARY.

On stream.] *See* WATER AND WATER-COURSE, 26.

BRIBERY.

See CRIMINAL LAW, 343.

BURGLARY.

See CRIMINAL LAW, 543.

CARRIER.

1. *Negligence — contributory — riding in baggage car.*] One who is injured by accident while unnecessarily riding in a baggage car, and who would have escaped had he been in a passenger car, cannot recover. *Houston & T. C. Railroad Co. v. Clemmons* (Tex.), 799.

CARRIER — *Continued.*

2. **Successive** — presumption as to liability. Where one of a continuous line of carriers is sued for injury to goods intrusted to him for carriage, there is no presumption that he received them in good order, but the fact must be affirmatively proved by the plaintiff. *Marquette, etc., Railroad Company v. Kirkwood* (Mich.), 453.

See SUNDAY.

CHARITY.

Public.] *See* STATUTE, 369.

CHATTEL MORTGAGE.

See MORTGAGE, 395.

CHECK.

See NEGOTIABLE INSTRUMENT, 142.

COLLATERAL SECURITY.

See NEGOTIABLE INSTRUMENT, 92.

COMITY.

See CONFLICT OF LAWS, 258.

COMMISSIONS.

See USURY, 47.

COMMON CARRIER.

See CARRIER.

CONDITION.

See INSURANCE, 68.

CONFLICT OF LAWS.

Comity — chattel mortgage.] A chattel mortgage on property in Indiana, executed and recorded in another State, but not recorded in Indiana, and never delivered to the mortgagee, is invalid as against attaching creditors. *Ames Iron Works v. Warren* (Ind.), 258.

See MARRIAGE, 505.

CONSIDERATION.

Injury by practical joke.] The defendant kept a box of smoking tobacco on his counter for the gratuitous use of the public. The plaintiff was in the habit of filling his pipe therefrom, as was known to the defendant. The defendant, by way of joke, put gunpowder with that tobacco, and the plaintiff, filling his pipe therefrom, was injured by the explosion. The plaintiff made a claim against the defendant for damages, and the defendant executed to him the note in suit therefor. *Held* valid. *Parker v. Enslow* (Ill.), 538.

CONSIDERATION — *Continued.*

Of contract to make will.] See WILL, 595.

See DEED, 409 ; GUARANTY, 279 ; MARRIAGE, 89.

CONSTITUTIONAL LAW.

1. *Commutation of sentence for good behavior — retrospective effect.] A statute granting a deduction from the term of sentence of convicts for good behavior is void as to sentences imposed before the statute takes effect. Ex parte Darling (Nev.), 495.*
2. *Employment of women in dance-houses.] The Constitution provides that no person shall be disqualified by sex from pursuing any lawful vocation. An ordinance enacted that no person having charge or control of any place where malt, vinous or spirituous liquors are sold should permit any female to be there between 6 P. M. and 6 A. M., with an exception as to wives and daughters attending at hotels, restaurants or grocery stores of their husbands and fathers ; and excepting public gardens, and balls not held in drinking saloons or bar-rooms. Held unconstitutional. Matter of McGuire (Cal.), 125.*
3. *Exclusion of Chinese jurors.] Chinese may be lawfully excluded from juries on the ground of alienage. Id.*
4. *Legislative infringement of existing rights.] A merchant purchased a stock of pistols under a license. The privilege was repealed by an act of the legislature after his license had expired but before his stock was exhausted. Offering to sell the balance afterward, held, that he was liable to the penalties of the act. State v. Burgoyne (Iowa), 60.*
5. *License fees — taxation.] A city may lawfully impose a license fee for dram-shops, and the legislature may lawfully direct that the proceeds shall be apportioned among the public schools of the city. City of East St. Louis v. Trustees of Schools (Ill.), 606.*
6. *Prohibition of opium.] A statute prohibiting the sale of opium is constitutional. State v. Ah Chew (Nev.), 488.*
7. *Right of colored children in common schools.] Where the State has not authorized separate common schools for colored children, a city board of education has no right to establish them, and exclude such children from the other schools. People ex rel. v. Board of Education (Ill.), 196.*
8. *Seizure and destruction of property illegally used.] A statute providing for the forfeiture and seizure and destruction or sale, by peace officers, without judicial hearing and judgment, of implements used in illegal fishing, is unconstitutional. Ieck v. Anderson (Cal.), 115.*

See HIGHWAY, 598 ; MARRIAGE, 705.

CONTRACT.

1. *Agency — estoppel.] A builder contracted to furnish materials, and erect a house according to certain plans and specifications, for a certain sum; the materials and work to be approved by a specified superintending architect. On the order of the architect he did extra work which increased*

CONTRACT — *Continued.*

the expense and value. When nearly completed he rendered to the owner a written statement of the extras, to which the owner then made no objection. Other extras were subsequently added on the like order. *Held*, that the builder could not recover of the owner for any of the extras. *Starkweather v. Goodman* (Conn.), 153.

2. **Breach of promise of marriage — renewal.]** A renewal of a promise of marriage after breach does not defeat an action for the breach. *Kurtz v. Frank* (Ind.), 275.
3. — **validity of promise — when action accrues.]** A man promised to marry a woman in September or October if they could agree and get along and be true to each other, and that if she became pregnant from their intercourse, he would marry her immediately. She became pregnant in July, but he then refused to marry her. *Held*, (1) that the illicit intercourse did not so enter into the consideration as to render the agreement void; (2) that an action for the breach accrued at once. *Id.*
4. **To build house — destruction by fire before completion.]** Where one having nothing to do with the painting, glazing, carpenter or joiner work, contracted to furnish materials for the mason work of a building and perform the labor thereon, except that the owner for whom the same was to be constructed was to furnish, upon the ground, all the sandstone and a certain quantity of lime, and haul all the brick, and the building, not being in the exclusive possession of such contractor, just before completion was destroyed by fire, without the fault of the contractor, the loss must fall upon the owner, especially where he had the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed. *Cook v. McCabe* (Wis.), 765.
5. **Condition — parol evidence.]** An executor contracted to sell land by a contract perfect and absolute on its face; but annexed was a paper purporting to be an approval of the contract by the devisees, signed and sealed by four, and with five other seals with no names attached. *Held*, that parol evidence was competent to show that the written approval of the nine devisees was a condition of the contract. *Wendlinger v. Smith* (Va.), 727.
6. **Privity — want of.]** A water company, contracting to supply a municipal corporation with water to extinguish fires, is not liable to a citizen for breach of that contract, whereby his property was burned, nor is it liable to the city in damages by reason of diminution of taxable property. *Ferris v. Carson Water Company* (Nev.), 485.
7. **Validity — non-compliance with statutory requirement.]** Statutes required of sellers of commercial manures the observance of certain conditions, under penalty, but did not declare contracts for sale void for the non-observance. *Held*, that a seller might recover on such contract, although he had failed to conform to the statutory requirements. *Niemeyer v. Wright* (Va.), 720.
8. —.] The defendant wrote the plaintiff, a stock broker, to buy him a

CONTRACT — *Continued.*

certain number of shares of a given stock, "on margin," offering a collateral security. The plaintiff complied, receiving the stock and afterward selling it on the defendant's order at a profit. Similar subsequent transactions resulted in loss, exceeding the value of the collateral. In an action to recover the balance, *held*, that the contract was valid. *Hatch v. Douglas* (Conn.), 154.

9. To make a will — consideration — immorality.] A man had sexual connection with another's wife under promise of marriage. She became pregnant and threatened him with prosecution. He then promised to make a will giving all his property to her and the child. *Held* not enforceable. *Drennan v. Douglas* (Ill.), 595.

For sale of land on stream.] *See* WATER AND WATER-COURSE, 26.

CONTRIBUTION.

See LIMITATION, 23.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

Foreign — garnishment of — demand.] A foreign corporation, doing business in Illinois and having property there, may be garnished there, and no previous demand is necessary. *Hannibal and St. Joseph Railroad Company v. Crane* (Ill.), 581.

COUNTY TREASURER.

See OFFICE AND OFFICER, 675.

COVENANT.

See DEED, 254.

CRIMINAL LAW.

1. Attempt to administer poison.] Merely delivering poison to one and asking him to put in the spring of a certain other is not "an attempt to administer poison." *Stabler v. Commonwealth* (Penn.), 653.
2. Bar — robbery — assault with intent to kill.] A conviction of robbery is a bar to a subsequent indictment, founded on the same transaction, for assault with intent to murder. *Wilcox v. State* (Ia.), 53.
3. Bribery.] Bribery or attempt at bribery of an elector is a crime at common law, and so is an offer to pay him money for giving in his ballot. *State v. Jackson* (Me.), 243.
4. Burglary — room of guest at inn.] In an indictment for an attempt to commit burglary, the chamber of a guest at an inn must be laid as the dwelling-house of the innkeeper and not of the guest. *Rodgers v. People* (N. Y.), 548.

CRIMINAL LAW — *Continued.*

5. **Drunkenness as excuse for crime.]** Drunkenness is no excuse for homicide, although the result of an irresistible appetite, overcoming the will and amounting to a disease, and is immaterial on the question of premeditation. *Flanigan v. People* (N. Y.), 556.
6. **False pretenses — obtaining satisfaction of debt.]** Obtaining satisfaction of one's debt due to another, by false pretenses, no money passing, is not indictable. *Jamison v. State* (Ark.), 108.
7. — **"ordinary prudence."] The defendant falsely represented to B., an ignorant negro, that he was a practicing physician, and that he had restored sight to a blind man; that B.'s dwelling-house was infected with poison; that the poison was in the bed of B.'s granddaughter (who was then and there lying sick), and that she was poisoned, and that he could remove the poison for pay; whereupon B. paid him money to remove it. Held, false pretenses, although they might not have been credited by a person of greater prudence and intelligence. Bowen v. State (Bart.), 71.**
8. **Homicide — res gestæ — declarations of deceased.]** On a prosecution of manslaughter, the prosecution cannot, as part of their affirmative case, prove declarations of the deceased before the conflict, to the effect that he did not propose to attack the defendant. *People v. Carlton* (Cal.), 112.
9. — **self-defense by one caught in adultery with defendant's wife.]** Adultery being only a misdemeanor, one who being caught by a husband in adultery with his wife resists an attack made upon him by the husband, and kills him to save his own life, is guilty only of manslaughter. *Reed v. State* (Tex. Ct. App.), 795.
10. **Infancy — capacity.] A male infant, about twelve years old, put his hand over the mouth of a girl ten years old, while his elder brother attempted to commit a rape upon her. Held not sufficient to warrant his conviction as principal in the second degree. Law v. Commonwealth (Va.), 750.**
11. **Larceny — what constitutes.] The prisoner agreed to buy goods of a merchant for cash, the goods to be delivered C. O. D., to an expressman whom he would send. Shortly after, an employee of the prisoner called at the merchant's shop, falsely representing himself to be an expressman, and stating that he had come for the goods. They were delivered to him with instructions to collect on delivery. He delivered them to the prisoner, receiving from him a worthless check, which he left at the merchant's shop in his absence. The prisoner refusing to give up the goods or pay for them, held, that a conviction of larceny was justifiable. Shipplly v. People (N. Y.), 551.**
12. — **dog.] A dog is subject of larceny, where personal property is defined as "goods and chattels." State v. Brown (Bart.), 81.**
13. — **lost goods.] A merchant sold a trunk to the defendants. Unknown to either, it contained goods previously sold to another. On getting the trunk home the defendants discovered the contents, and retained them. Held, that the larcenous intent need not have been formed at the time of**

CRIMINAL LAW — *Continued.*

- the delivery of the trunk, but it was sufficient if it was formed at the time of the discovery of the goods. *Robinson v. State* (Tex. Ct. App.), 790.
14. **Perjury — essentials of oath.]** Where the prisoner handed to an officer, authorized to take and certify affidavits, an affidavit previously signed by him, and reciting that he had been duly sworn, and the officer affixed his own signature to the jurat without any words or formalities, *held*, that perjury could not be predicated of the transaction. *O'Reilly v. People* (N. Y.), 525.
 15. **Profane swearing — nuisance.]** The utterance of the name of God is not necessary to constitute profane swearing. A single act of profane swearing is generally not indictable as a nuisance. *Gaines v. State* (Lea), 64.
 16. **Rape — infant — presumption.]** The presumption that a boy under fourteen cannot commit rape may be rebutted by proof of the actual commission. *Wagoner v. State* (Lea), 36.
 17. **Sentence — expiation — statutory construction.]** A convict was sentenced to imprisonment in the penitentiary at hard labor "for the term of two years from this date, February 27, 1879." He appealed, and was not transferred to the penitentiary until July 31, 1879. *Held*, that his imprisonment in the penitentiary should date from the latter day. *Ex parte Duckett* (S. C.), 694.
 18. **Witness — accomplice in incest.]** In incest the woman is an accomplice, and on the trial of a prosecution therefor her testimony is subject to the rule respecting accomplice testimony. *Freeman v. State* (Tex. Ct. App.), 787.

CROP.

See MORTGAGE, 90.

CUSTOM.

- Of steamboat captains to insure boats.]** A general and notorious custom of steamboat captains at large river ports to insure their boats and execute premium notes therefor is reasonable, and valid as against the owners. *Adams v. Pittsburgh Insurance Company* (Penn.), 663

See EVIDENCE, 540.

DAMAGES.

1. **Exemplary.]** Exemplary damages are proper in an action of breach of promise of marriage, in case of fraud, deceit or seduction. *Kurtz v. Frank* (Ind.), 275.
2. **— excessive force against trespasser.]** In an action of assault and battery, it appearing that the plaintiff was trespassing on the defendant's premises, and that the latter used excessive force in ejecting him, exemplary damages are not recoverable. *Kiff v. Youmans* (N. Y.), 548.
3. **Measure of — family portrait.]** In an action for loss of a family portrait, the original cost and the probable expense of reproduction may be con-

DAMAGES — *Continued.*

sidered in estimating the damages. *Houston & Tex. Cent. R. Co. v. Burke* (Tex.), 808.

Injury to feelings.] See TELEGRAPH, 805.

See EVIDENCE, 808; FRAUD, 806; MUNICIPAL CORPORATION, 1; NUISANCE, 649.

DECLARATIONS.

Of deceased.] See CRIMINAL LAW, 112.

DEED.

1. **Acknowledgment — evidence to impeach.]** As against an innocent purchaser, the certificate of a married woman's acknowledgment of a deed may be impeached by proof that she did not acknowledge, but the evidence must be clear and conclusive, and exclude every reasonable doubt. A simple majority of witnesses will not answer. *Strauch v. Hathaway* (Ill.), 198.
2. **— evidence to supply defect in certificate.]** Parol evidence is inadmissible to supply a defect in the certificate of acknowledgment of a deed by a married woman. *First National Bank of Harrisonburg v. Paul* (Va.), 740.
3. **Appurtenances — mill-dam.]** A deed of a "mill and dam, with the appurtenances," will pass not only the dam at the mill, but an easement in a reservoir dam, half a mile above, owned by the grantor of the mill and the lower dam, and for many years used in conjunction with them, and up to which the lower dam has always flowed, although the grantor did not own all the adjoining land between the dams. *Baker v. Bessey* (Me.), 877.
4. **Consideration — restraint of marriage.]** A brother gratuitously deeded to his two sisters a leasehold property, to hold the same as tenants in common for both lives, with remainder to the survivor for life; or so long as both should remain unmarried, and from and after the marriage of either, then to the one remaining unmarried for life. *Held* not invalid as in restraint of marriage. *Arthur v. Cole* (Md.), 409.
5. **Covenant — easement.]** Defendant deeded to plaintiff, with covenants of warranty and quiet enjoyment, a dwelling-house and lot, described by metes and bounds, "with the appurtenances." A bath-room and water-closet in the house discharged through pipes into a sewer on adjoining premises owned by A. It appeared by parol evidence that the plaintiff at the time of taking his deed knew of this connection, and the apparent privilege enhanced the price of the premises. The defendant had no right to use A.'s sewer, and the plaintiff was subsequently enjoined by A. from such use. *Held*, that no action would lie for breach of covenant. *Green v. Collins* (N. Y.), 581.
6. **Covenant running with land — to maintain line fence.]** A covenant by the grantor in a deed forever to maintain a fence or wall on the line between the granted premises and the grantor's premises runs with the land. *Haslett v. Sinclair* (Ind.), 254.
7. **Delivery — agency.]** Husband and wife executed and acknowledged a deed of the wife's lands, and it was left by the wife in the husband's hands,

DEED — *Continued.*

- with authority to determine when, if ever, it should be delivered. The wife afterward built a house on the lands, in which she and her husband lived, and she subsequently died, and still subsequently the husband delivered the deed. *Held* ineffectual. *Bennesson v. Aiken* (Ill.), 592.
8. — *of, signed by grantee, in grantor's name.*] One is bound by his acknowledgment and delivery of a deed to which his name has been signed by the grantee. *Clough v. Clough* (Me.), 386.
9. — *marriage — ante-nuptial settlement.*] An insolvent, in accordance with an oral agreement of marriage, executed and acknowledged a deed to his intended wife, and handed it to her before marriage, and she handed it back to him to have it recorded and to take care of it for her. He recorded and kept it. *Held*, (1) a valid delivery; (2) a valid ante-nuptial settlement as against creditors, the grantee being ignorant of the grantor's insolvency. *Otis v. Spencer* (Ill.), 617.
10. *Lunacy of grantee.*] The unconditional delivery of a deed to a third person for the use of a lunatic grantee not under guardianship, followed by circumstances indicating acceptance by the grantee, is a valid delivery. *Campbell v. Kuhn* (Mich.), 479.
11. — *administrator's right to avoid.*] The administrator of an insane grantee cannot avoid a deed to him and recover the consideration paid. *N.*
12. *Surrender and destruction.*] Title to land is not reinvested by the surrender of the deed to the grantor and its destruction by him. *Rogers v. Rogers* (Wis.), 756.
13. *Declaration of trust.*] A grantee is not affected by a separate declaration of trust, not referred to in the deed nor known to the grantee. *Id.*

DELIVERY.

Of deed.] *See* DEED, 386, 592, 617.

Of gift.] *See* GIFT, 754.

See SALE, 165, 167, 170.

DEVISE.

See WILL.

DISBARMENT.

See ATTORNEY, 637.

DIVORCE.

See MARRIAGE.

DRUNKENNESS.

As excuse for crime.] *See* CRIMINAL LAW, 556.

DUE PROCESS.

See CONSTITUTIONAL LAW, 115.

EASEMENT.

Conveyance by implication.] *See* DEED, 877, 581.

ELECTION.

See AGENCY, 174 ; LANDLORD AND TENANT, 350.

EMBLEMENTS.

See LANDLORD AND TENANT.

EMINENT DOMAIN.

1. **Statute construction — "rights and franchises."]** The taking and condemnation by a railroad company of part of the road-bed of another company is an "interference with the rights and franchises" of such other company. *Alexandria and Fredericksburg Railway Company v. Alexandria and Washington Railroad Company* (Va.), 743.
2. **—.]** One railroad company has no right, without express statutory authority, to acquire for its own uses land already acquired by another railroad company. *Id.*

ESTOPPEL.

Married woman's deed.] A married woman, who has insufficiently executed a deed of her real estate to one having knowledge of her coverture, is not estopped from reclaiming the land by the fact that she has received part of the purchase-money and induced the purchaser to make valuable improvements. *Innis v. Templeton* (Penn.), 643.

See BANK, 633 ; CONTRACT, 152 ; FRAUD, 884.

EVIDENCE.

1. **Custom — unreasonable.]** In an action of damages for fraudulent representations, by a broker employed to sell cigars, as to responsibility of a proposed buyer from the principal, evidence was admitted on behalf of the defendant, in order to show that the principal did not rely on the representations, that by custom and usage, manufacturers and dealers in cigars do not rely on representations by brokers as to the responsibility of purchasers. *Held* error. *Fuller v. Robinson* (N. Y.), 540.
2. **—.]** Competent to show meaning of "on margin." *Hatch v. Douglas* (Conn.), 154.
3. **Family tradition.]** Evidence of family tradition as to cost of family paintings is incompetent to show their market value. *Hudson and Texas Central Railroad v. Burke* (Tex.), 808.
4. **Judicial notice.]** Courts take judicial notice of the navigability of large rivers. *Wood v. Fowler* (Kans.), 330.
5. **Privilege.]** A physician may not testify, to the injury of his patient or his representatives, to facts which he learned concerning the patient's ailments either by the patient's statements or by his own examination and observation. *Masonic Mutual Benefit Association v. Beck* (Ind.), 295.

EVIDENCE — *Continued.*

6. Memorandum.] Employees in a hospital testified, in a capital case, to certain matters as within their recollection, refreshed by referring to the contemporaneous records of the hospital. The records were not produced in court, and the entries were not made by any of the witnesses. *Held* no error. *State v. Collins* (S. C.), 697.

7. Rule as to preponderance, in civil action involving criminal charge.] In a civil action involving a charge of forgery by one of the parties, the mere preponderance of the entire evidence, including that of good character, if any, and taken in connection with the legal presumption of innocence, must prevail. *Hills v. Goodyear* (Lea), 5.

To impeach acknowledgment.] *See* DEED, 193.

To show relation of parties to note.] *See* NEGOTIABLE INSTRUMENT, 163.

To supply defect in acknowledgment.] *See* DEED, 740.

Parol, to correct will.] *See* WILL, 289.

See CONTRACT, 727; NEGOTIABLE INSTRUMENT, 84, 624.

EXECUTION.

Levy — property in custody of court.] Personal property under levy on execution is not subject to a subsequent levy on another execution from any court. *Jones' Stationery and Paper Company v. Case* (Kans.), 810.

See PATENT, 120.

EXECUTOR AND ADMINISTRATOR.

An administrator of an insane grantee cannot avoid a deed to him and recover the consideration paid. *Campbell v. Kuhn* (Mich.), 479.

EXPLOSION.

See INSURANCE, 403.

FACTOR.

See AGENCY, 818.

FALSE PRETENSES.

See CRIMINAL LAW, 71, 103.

FENCE.

See DEED, 254.

FIRE.

Communication of.] *See* CONTRACT, 765; NEGLIGENCE, 734.

Covenant to restore premises.] *See* LANDLORD AND TENANT, 814.

FIXTURES.

As between lessor of chattels and defaulting purchaser of land.] The plaintiff leased to L. an engine and boiler, with a privilege of purchase. L.

FIXTURES — *Continued.*

affixed them in a permanent manner to land of the defendant in possession of L. under a contract for purchase. The contract provided that if L. failed to perform, all tools and machinery put on the land by him should belong to the defendant. The plaintiff knew that the engine and boiler were to be affixed to the land, but did not know of this agreement respecting fixtures. L. failed to perform. *Held*, that the plaintiff could recover the engine and boiler or their value from defendant. *Hendy v. Dinkerhoff* (Cal.). 107.

FORMER ADJUDICATION.

See JUDGMENT, 608.

FRAUD.

1. **Estoppel.]** One who executed his note, in consideration of a conveyance accepted by him to aid the grantor in defrauding his creditors, cannot avoid it on the ground of its illegality. *Butler v. Moore* (Me.), 848.
 2. **Obtaining goods intending not to pay — promissory note — damages.]** The defendant delivered his promissory note in consideration of the payee's promise to deliver him in the future five mowers and four plows. The payee at the time positively intended never to deliver any of the goods. Subsequently he delivered two plows, but never delivered any of the other goods. In an action by an indorsee, with knowledge of the fraud, *held*, that the plaintiff was entitled only to recover for the plows furnished, less the damages sustained by the defendant by the non-delivery of the rest of the articles. *Burrill v. Stevens* (Me.), 368.
 3. **Procuring of conveyance.]** Where one procures a deed of real estate from the owner, without consideration, and knowing the true ownership, the grantor supposing the grantee to be the true owner, the conveyance will be set aside in equity as between the parties. *McCormick v. Miller* (Ill.) 577.
 4. **Undue influence in obtaining contract.]** A son, of age, forged the names of his father and uncle and a third person on a note. Several officers of the bank, which discounted it, one of whom was a lawyer, in a private and prolonged interview with the father, who was a farmer and little acquainted with business, informed him of the forgery. He was greatly unnerved by the discovery of his son's crime, and had no opportunity to take legal or friendly counsel. At this interview these officers persuaded him to execute his own note for the forged note, and requested him to keep the transaction secret. The note so executed was for a larger sum than the maker's entire property would have brought at forced sale. *Held*, that such note must be cancelled in equity. *Coffman v. Lookout Bank* (Lea), 81.
- Fictitious payee.]** *See* NEGOTIABLE INSTRUMENT, 886.

GARNISHMENT.

See CORPORATION, 581.

GIFT.

Causa mortis—delivery.] While on his death-bed, and about three hours before his death, W. told the attending nurse that his pocket-book was "under the bed, just under his shoulders," and requested her to "take it and give it to his wife when she came," with the money and papers contained in it. Several hours after his death the nurse for the first time took the pocket-book, and gave it to another person, with directions to give it to the widow if she came, or send it to her if she did not come. *Held* not a valid gift. *Wilcox v. Matteson* (Wis.), 754.

GUARANTY.

Notice of acceptance—consideration.] An agreement to guarantee an existing debt, if the creditor will give the debtor a little more time, is valid without describing the debt particularly, and requires no notice of acceptance. *Wills v. Ross* (Ind.), 279.

See STATUTE OF FRAUDS, 780.

HIGHWAY.

Right of lot-owner to restrain closing of street—constitutional construction.] An owner of land on a city street sought to restrain the city from vacating part of the street several blocks distant from his property. It did not appear that he would suffer special and peculiar injury, or that his property would be physically injured; but it did appear that he had paid an assessment for benefit by the opening of the street, and that by the closing he would lose some tenants. *Held*, not maintainable, although the Constitution provides that property shall not be damaged for public use without due compensation. *City of Chicago v. Union Building Association* (Ill.), 598.

See MUNICIPAL CORPORATION, 759.

HOMICIDE.

See CRIMINAL LAW, 112, 995.

ICE.

See WATER AND WATER-COURSE, 196, 890.

INDICTMENT.

See CRIMINAL LAW, 548.

INFANCY.

Disaffirmance of contract.] One cannot recover land conveyed by him during minority, unless he disaffirms the contract within a reasonable time after majority, and tenders the consideration received. *Bingham v. Barley* (Tex.), 801.

See CRIMINAL LAW, 36, 750; NEGLIGENCE, 664; PARENT AND CHILD, 331.

INJUNCTION.

1. **Malicious erection on one's own land.]** A. and B. were rivals in business and occupied adjoining stores on a city street, there being no space between their buildings. A.'s store came up to the street line; B.'s was a few feet back with an intervening platform. A plate glass window had been placed in the wall of A.'s store, looking over B.'s platform, and A. used it in displaying his goods. B. had a show case made to place upon his platform in front of this window, his object being primarily to display his own goods, and secondarily to cover A.'s window and to annoy and injure him in the use of his store. *Held* not to be a case for an injunction under the statute forbidding malicious erections to annoy and injure adjacent proprietors. *Gallagher v. Dodge* (Conn.), 182.
2. **To restrain occupant's use of premises.]** The owner of real estate, of which another has taken unauthorized possession, cannot have him enjoined from making a legal use of the premises, although it is one of which the landlord disapproves. *Bodwell v. Crawford* (Kans.), 306.

See WATER AND WATER-COURSE, 419.

INSANITY.

Of grantees.] *See* DEED, 479.

INSURANCE.

FIRE.

1. **Condition — "cease to be operated."]** A policy of fire insurance, issued on a manufactory, conditioned to be void if the premises become and remain for thirty days unoccupied, or "cease to be operated," is not avoided by a temporary cessation occasioned by the prevalence of yellow fever. *Poss v. Western Assurance Company* (Lea), 68.
2. **Double — void policy.]** A policy of fire insurance, conditioned to be void in case of other insurance not indorsed or consented to, is avoided by the existence of another insurance, conditioned to be voidable for vacancy, and which might have been avoided on that account, but had not been, at the time of the insurance in question. *Landers v. Watertown Fire Insurance Company* (N. Y.), 554.
3. **—.]** A policy of fire insurance, conditioned to be void in case of making any subsequent insurance on the same property not consented to is not avoided by a subsequent insurance conditioned to be void in case of any other insurance on the same property not consented to. *Jersey City Insurance Company v. Nichol* (N. J.), 625.
4. **Explosion.]** A fire insurance on sulphuric acid exempted the insurer from liability for loss by explosion unless fire ensued. The building in question was blown down by a storm, and the chamber containing the acid was broken and the acid was lost. The plaintiff claimed that the storm blew fire in contact with escaping gases and air and created an explosion, which caused the loss. *Held*, that in either case there was no liability under the policy. *Trans-Atlantic Fire Insurance Company v. Dorsey* (Md.), 408.

INSURANCE— *Continued.*

FIRE.

5. "Manufacturing establishment."] A steam flour mill is a "manufacturing establishment." *Cartin v. Western Assurance Company of Toronto, Canada* (Md.), 440.
6. Lights.] A fire insurance policy prohibited the use of camphene, spirit gas, burning fluid or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps filled by daylight. The insured used for lights lard oil and candles, filling the lamps at night. *Held* no breach of condition. *Id.*
7. "Premises"—petroleum for lubrication.] A fire insurance policy on a specifically described steam flour mill and machinery prohibited the keeping of petroleum on "the premises." The insured kept a barrel of petroleum in the engine-house adjoining, but not included in the specific description of the premises. The fire originated in the main building. *Held*, that the petroleum was not on "the premises," and that the insured had a right to keep petroleum on the premises for the purpose of lubricating the insured machinery. *Id.*
8. "Riot."] An insurance policy provided that a company should not be liable for fire caused by "invasion, insurrection, riot, civil commotion, or military or usurped power." A coal-breaker insured was burned by a party of men at night, who fired shots and drove away the watchman. *Held* a riot, without proof of a previous unlawful assembling, accompanied by force or violence. *Lycoming Fire Insurance Company v. Schwenk* (Penn.), 629.

LIFE.

9. Waiver.] The demand and receipt of assessments by a life insurance company, after the death of the insured, with knowledge of his death, and that the contract was voidable on account of misrepresentations by the insured, waives the forfeiture. *Masonic Mutual Benefit Association v. Beek* (Ind.), 295.
10. Husband for wife—"endowment" policy.] Under the statute permitting a wife to insure her husband's life for her benefit, he paying the premiums, and to hold the proceeds as against his creditors, the insurance may be on the "endowment" plan. *Brummer v. Cohn* (N. Y.), 503.

See CUSTOM, 662.

INTEREST.

- Recoverable on penalty of bond.] Interest may be recovered on the penalty of a bond. *Wyman v. Robinson* (Me.), 860.

JUDGMENT.

1. Bar—splitting causes of.] A note being payable in one year, with interest semi-annually, and a suit being brought two years afterward to recover the interest then due, a judgment therein will be no bar to a subsequent action for the principal. *Dulaney v. Payne* (Ill.), 205.
2. Former foreign.] A judgment of a court of competent jurisdiction in Indiana, upon a trial on the merits, setting aside a deed to the grantor's

JUDGMENT — *Continued.*

wife for the insanity of the grantor, is conclusive in a suit in Illinois, as to another deed made at the same time by the same grantor to a trustee for his wife. *Hanna v. Read* (Ill.), 608.

JUDICIAL NOTICE.

As to navigability of rivers.] See WATER AND WATER-COURSE, 830.

JUDICIAL SALE.

See SALE, 690.

JURISDICTION.

Administration on estate of living person.] Administration on the estate of a living person is void. *D'Arment v. Jones* (Lea), 12.

JURY.

See CONSTITUTIONAL LAW, 488.

LANDLORD AND TENANT.

1. **Emblements.]** A tenant under a lease for an indefinite period, but which was terminated September 1, 1873, having sowed a crop of oats in November, 1872, and harvested it in June, 1873, had plowed in the stubble in the latter month, and the crop was growing when he left, in November, 1873. *Held*, that he could not afterward enter and harvest that crop. *Henderson v. Cardwell* (Bart.), 93.
2. **Fire — covenant to restore.]** A covenant by lessees to restore the premises "in as good condition as when delivered to them, that is to say, in good running order, ordinary wear and tear excepted," does not bind them to rebuild in case of casual destruction by fire, nor render them liable for such loss. *Miller v. Morris* (Tex.), 814.
3. **Holding over — election.]** A tenant under a lease for three years with a privilege of five more, holding over, is bound for the full further term of five years. *Montgomery v. Board of Commissioners of Hamilton County* (Ind.), 250.
4. **Lease — construction of.]** A lease of land provided that the lessee should "hold the same, and enjoy and use all the rights and privileges of real ownership as in fee-simple," so long as he should carry on a certain iron furnace, and that he should pay the taxes, and should pay a royalty to the lessor for every ton of iron-ore dug thereon; but gave no express right to dig either iron-ore or limestone. *Held*, that he might quarry limestone on the premises for the use of the furnace. *Watterson v. Reynolds* (Penn.), 672.
5. **Recovery by disseisee against tenant of disseisor.]** A disseisee, lawfully recovering possession, may maintain trespass for meane profits against the disseisor's tenant, notwithstanding the latter has in good faith paid the rent to the disseisor. *Trubee v. Miller* (Conn.), 177.

See INJUNCTION, 306.

LARCENY.

Of lost goods.] *See* CRIMINAL LAW, 790.

Of dog.] *See* CRIMINAL LAW, 81, 551.

LEASE.

Of organ.] *See* SALE, 170.

See LANDLORD AND TENANT.

LIBEL.

On judge.] *See* ATTORNEY, 687.

LIEN.

See BAILMENT, 659 ; NOTICE, 287.

LIMITATION.

1. Statute of — acknowledgment.] "I will pay it as soon as possible," is a sufficient acknowledgment to revive a debt barred by the statute of limitation. *Norton v. Shepard* (Conn.), 157.
2. — — to stranger.] A promise to a stranger to pay a debt barred by the statute of limitations is only available where it was intended to be communicated to the creditor. *Bachman v. Roller* (Bart.), 97.
3. — — statutory construction.] One of two makers of a note wrote the holder a letter, suggesting that he proceed against his co maker, and saying, "I do not want to be held longer on the note." Held an "acknowledgment of an existing liability," within the statute. *Elder v. Dyer* (Kans.), 820.
4. — — promise to toll.] There need not be an express promise to take a demand out of the statute of limitation, but a clear, distinct, and unequivocal acknowledgment of the debt, consistent with a promise to pay, will suffice for the law to imply a promise. *Palmer v. Gillespie* (Penn.), 657.
5. Payment after bar by co-surety — contribution.] A surety who pays the debt after it is barred by the statute of limitation cannot compel his co-surety to contribute. *Cooke v. Hoffman* (Lea), 28.
6. Statute of — when attaching.] *See* NEGOTIABLE INSTRUMENT, 162.

MALICE.

See INJUNCTION, 182.

MARRIAGE.

1. Bequest by husband to wife — divorce.] A bequest by a husband in favor of his wife is not avoided by a subsequent divorce for her fault. *Card v. Alexander* (Conn.), 187.
2. Divorce — extreme cruelty.] A wife, against her husband's objection, went to the house of her parents to be confined. The husband at first refused to go to see her after her confinement, but at last went, and then told her that if she did not return before the next week's newspaper was published,

MARRIAGE — *Continued.*

ne would "advertise" her, indirectly charged her with incest with her father, and intimated that the child was her father's; and the wife not returning, he did "advertise" her desertion. *Held* extreme and wanton cruelty, warranting a divorce. *Palmer v. Palmer* (Mich.), 461.

3. — remarriage in another State — statute.] A marriage between E. and B. was dissolved in New York on the ground of B.'s adultery, and B. forbidden to marry during E.'s life-time, in accordance with the statute declaring such remarriages void. Afterward and during E.'s life B. went with I., a resident of this State, to Connecticut, and there married I., returning the same day to New York and thereafter living in New York. The marriage in Connecticut was valid there, but was resorted to for the purpose of evading the prohibition in the decree of divorce. *Held*, that a child of B. and I., subsequently born in New York, was legitimate. *Van Voorhis v. Brintnall* (N. Y.), 505.
4. Intended husband's ante-nuptial assent to intended wife's will.] An affianced wife executed her will before marriage, having obtained the oral consent of her intended husband. *Held* valid as an ante-nuptial settlement, although the will was revoked by the marriage by force of statute. *Lanf's Appeal* (Penn.), 646.
5. Note to induce wife's return.] A note executed by a husband to his wife living separate from him to induce her to return cannot be enforced by the wife. *Copeland v. Boas* (Bart.), 89.
6. Survivorship as to note — husband and wife.] If a husband takes for a debt due him a note payable to himself and his wife, it is presumed to be intended as a gift to her if she survives him; but he may defeat this right by will. *Pile v. Pile* (Lea), 50.
7. Wife's contract as surety — constitutional law.] The Constitution of South Carolina permits married women to acquire, and hold, and bequeath, devise or alienate property as if unmarried. The legislature enacted that they may contract as if unmarried. *Held* constitutional, and that a married woman's engagement as surety is valid although not in terms charging her separate property. *Peleer v. Campbell* (S. C.), 705.

Breach of promise of.] *See* CONTRACT, 275.

Restraint of.] *See* DEED, 409.

See ESTOPPEL, 643.

MASONIC LODGE.

See STATUTE, 369.

MASTER AND SERVANT.

1. Agricultural laborer on shares — enticing away.] An action lies for enticing away the plaintiff's agricultural laborer, employed upon an agreement for a part of the crop made, for his compensation. *Huff v. Watkins* (S. C.), 680.
2. Course of employment.] A toll-gate keeper having charge of the gate at

MASTER AND SERVANT — *Continued.*

all times, but not required to collect toll at night after nine o'clock, let the beam of the gate down upon the plaintiff, who was endeavoring to pass the gate after that hour, and injured him. *Held* that the company was liable. *Noblesville and Eagletown Gravel Road Company v. Gauss* (Ind.), 224.

Duty as to machinery — derrick rope.] A servant was killed by the breaking of a rope on the master's derrick on the first day of his using it in the master's work. The rope was two or three years old, had been exposed to the weather, and was rotten, although apparently sound. *Held*, that there was evidence of the master's negligence for the jury, and that the servant was not guilty of contributory negligence. *Baker v. Allegheny Railroad Company* (Penn.), 634.

MEMORANDUM.

See AGENCY, 775; EVIDENCE, 697; STATUTE OF FRAUDS, 352.

MERGER.

See NEGOTIABLE INSTRUMENT, 84.

MORTGAGE.

1. **Of chattels to be acquired — attaching creditors.]** Where one mortgaged personal property to be afterward acquired, and having acquired it, delivered it to the mortgagee under the mortgage, *held* inoperative as against attaching creditors of the mortgagor. *Griffith v. Douglass* (Me.), 395.
 2. **Of crop to be planted.]** A mortgage of a crop to be planted is valid, even as against creditors. *Watkins v. Wyatt* (Bart.), 90.
- Chattel.]** *See* CONFLICT OF LAWS, 258.

See SUNDAY, 684.

MUNICIPAL CORPORATION.

1. **Negligence — remedy over against lot-owner.)** A city lawfully enacted an ordinance requiring lot occupants to remove ice and snow from sidewalks, and imposing a penalty for neglect. By reason of such neglect a passer was injured and recovered against the city, and the city having paid the judgment, sued the lot occupant therefor. *Held* not maintainable. *City of Hartford v. Talcott* (Conn.), 189.
2. **— highway.]** A city let certain street repairs to a contractor. The contractor put up a barrier at the point in question, which remained there at four o'clock, P.M., but it was removed by some stranger, and about nine o'clock of the evening of the same day, the plaintiff, in driving at that point, was injured by the defective condition of the street. Neither the contractor nor the city knew or had any notice of the removal of the barrier. *Held*, that no action would lie against the city. *Klatt v. City of Milwaukee* (Wis.), 759.
3. **Ordinance — illegal.]** Without special legislative authority, a city cannot by ordinance require cotton merchants to keep, for the inspection of the

MUNICIPAL CORPORATION — *Continued.*

police, a record of the names of purchasers and the quantities purchased. *Long v. Tazewell District* (Lea), 55.

4. **Recovery over against original wrong-doer.]** A traveller recovered judgment against a county for injuries sustained by him by reason of the defective condition of a canal bridge connecting a public highway. The canal company were legally bound to keep the bridge in repair; had notice of the suit; and joined in defending it. The county, having paid the judgment, brought this action against the canal company to recover the amount so paid, and the costs and counsel fees incurred in that defense. *Held* maintainable. *Chesapeake & Ohio Canal Company v. County Commissioners of Allegany County* (Md.), 480.
5. **Sewer — mode of construction — damages — nuisance.]** A court of equity has no power to compel a city to construct a sewer, nor jurisdiction of a claim of damages for injuries by the improper construction of one, except where the operation of the sewer may be enjoined as a nuisance. *Horton v. Mayor and City Council* (Lea), 1.

NECESSITY.

See SUNDAY.

NEGLIGENCE.

1. **Action of, for private breach of municipal duty.]** Where a city ordinance requires the citizens to keep their sidewalks free from ice, no action lies in favor of an individual against a citizen for an injury occasioned by his breach of that duty. *Taylor v. Lake Shore, etc., Railroad Company* (Mich.), 457.
2. **Contributory — infant trespasser on railway track.]** Except at public crossings, a railway company owes no duty to a young child on its track, nor to the child itself. *Cauley v. Pittsburgh, Cincinnati & St. Louis Railway Company* (Penn.), 664.
3. **— jumping from moving train.]** A passenger on a railroad train was aroused at 10 o'clock at night by the conductor, and informed that his station was reached, and told by him and the brakeman to hurry and get off. The train moving very slowly, he stepped off, and as the train had over-shot the platform, he fell and was injured. *Held*, that an action therefor was maintainable. *St. Louis, I. M. & S. R. R. Co. v. Cantrell* (Ark.), 105.
4. **Fire — allowing combustible matter near railway track.]** One owning land adjoining a railway is not bound to keep it clear of combustible matter along or near the track. *Richmond & Danville Railroad Company v. Medley* (Va.), 734.
5. **—.]** It may be negligent in a railroad company to allow combustible matter to accumulate on its land along its track. *Id.*
6. **Remote cause of injury.]** If the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the owner of the latter may recover therefor from the railroad com-

NEGLIGENCE — *Continued.*

pany. *Billman v. Indianapolis, Cincinnati & Lafayette Railroad Company* (Ind.), 280.

6. Respondent superior.] Lessees of a penitentiary are not responsible for an injury to a convict by the defective construction of a bunk made by a servant of the penitentiary commissioners having charge of the convicts. *Cunningham v. Moore* (Tex.), 812.

See ANIMAL, 448; CARRIER, 799; MASTER AND SERVANT, 634; MUNICIPAL CORPORATION, 189, 759.

NEGOTIABLE INSTRUMENT.

1. Bank — Men — bona fide holding.] The plaintiff drew a draft on London, payable to the order of C., a banker, and delivered the draft to C. for collection for his account. C. delivered the draft to defendant bank for his own account, he being in debt to the defendant. After payment, but before defendant received the proceeds, defendant was notified that the draft had been delivered to C. for collection only, and that the plaintiff claimed the proceeds. *Held*, that the defendant was not liable in *assumpsit* therefor. *Wyman v. Colorado National Bank* (Colo.), 183.
2. Check.] No action lies in favor of the transferee of an unaccepted check against the bank on which it is drawn. *Colorado National Bank of Denver v. Boettcher* (Colo.), 142.
3. — action by holder against drawee.] Possession and detention of a check by the bank on which it is drawn, for six days, does not constitute implied acceptance. *Id.*
4. Evidence to show relation of parties — limitation.] The plaintiff, at the request of the defendant and for his accommodation, signed as surety a note held by the defendant and payable to his order, upon the secret agreement between them that the defendant would not transfer it, and if the principal did not pay it the plaintiff should not be held. The defendant transferred the note and the plaintiff was compelled to pay it. In an action to recover the amount paid, *held*, (1) that parol evidence was competent to show the agreement; (2) that the plaintiff was entitled to recover thereunder; (3) that the statute of limitations did not attach until the plaintiff was compelled to pay the note. *Graves v. Johnson* (Conn.), 163.
5. — to vary indorser's liability — merger — collateral security.] The defendant indorsed to C. a promissory note, which C. afterward indorsed to the plaintiff. At the time of the transfer to C. the note was secured by a mortgage to the defendant, and C. had foreclosed a subsequent mortgage of his own on the same premises, and bought in the property. *Held*, that evidence was competent to show that it was agreed between the defendant and C., at the time of the transfer of the note to C., that C. was buying to relieve his property of this incumbrance, and was to be subrogated to all the defendant's rights, and that defendant was not to be in any manner liable; and also *held* that there could be no recovery on the note, as the debt was merged, the transfer of the note carrying the mortgage with it. *McCallum v. Jobs* (Bart.), 84.

NEGOTIABLE INSTRUMENT — *Continued.*

6. **Execution by agent.]** A note in ordinary form, "we promise to pay," was signed, "Samuel L. Keith, President, Chicago Ready Roofing Co.," and at the left was signed, "W. H. Kletsinger, Secretary," and bore the seal of the company. *Held*, that evidence was competent to show the incorporation of the company and the character of its business. *Scanlan v. Keith* (Ill.), 624.
7. **Fraud — fictitious payee.]** Where one is induced by the false and fraudulent representations of another to draw a bill to the order of a third person, known to the drawer, and present to his mind at the time as the payee, a *bona fide* transferee cannot recover without the genuine indorsement of such payee, although the payee was ignorant of the transaction. *Kohn v. Watkins* (Kans.), 836.
8. **—.]** Where one is induced by false and fraudulent representations to draw a bill to the order of a fictitious person, supposing him to be real, and delivers the bill with the instructions to deliver it to the payee on receiving a mortgage security, and the fraudulent receiver negotiates the bill to an innocent purchaser, the drawer is liable. *Id.*
9. **Negotiability — provision for attorney's fee — power to hasten maturity.]** A promissory note, conditioned to pay expenses of collection, including attorney's fees, and giving the payee power to declare it due at any time he may deem it insecure, is not negotiable. *Morgan v. Edwards* (Wis.), 781.
10. **—.]** A written provision to pay a certain sum of money at a certain time to the order of another, but joined with a stipulation concerning the title to property, and promises in respect to the same, and a warranty as to the pecuniary responsibility of the promisor, is not negotiable. *Killam v. Schoeps* (Kans.), 818.
11. **When binding partnership.]** Where one partner makes his own note to his own order, and indorses it individually, and in the firm name, to an innocent purchaser, appropriating the proceeds to his own use, the firm will be liable thereon to the holder. *Reddon v. Churchill* (Me.), 345.
12. **Payment.]** A Nashville bank discounted a note indorsed by a Knoxville bank and the defendant, and made for the benefit of the Knoxville bank. The banks were regular correspondents of each other, and settled their accounts monthly. At maturity the Nashville bank sent the note to the Knoxville bank with instructions to collect and credit, and the latter, being in funds, although insolvent, and failing two days later, entered the amount due to the credit of the Nashville bank. *Held* a payment, releasing the accommodation indorser. *First National Bank of Nashville v. McClung* (Lea), 66.
13. **Transferred as collateral security.]** A negotiable note, transferred by the payee before maturity as collateral security for an existing debt and future advances, is subject to equities between maker and payee at the time of transfer. *Richardson v. Rice* (Bart.), 92.

Check on wager.] *See* WAGER, 189.

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NOTICE.

- Of lien** — construction.] Defendant drew a deed, and as notary public took the acknowledgment of its execution, and also drew notes, executed by the grantee for the unpaid purchase-money. Four years afterward he bought the premises. *Held*, that he was not chargeable by these facts with notice of the vendor's claim and lien for unpaid purchase-money. *Whits v. Fisher* (Ind.), 287.
Of acceptance.] *See* GUARANTY, 279.
Of viciousness.] *See* ANIMAL, 448.
Judicial.] *See* EVIDENCE, 330.
 See BANK, 218.

NUISANCE.

1. **Liberty pole** — damages — remoteness.] A liberty pole in a city street is

NUISANCE — *Continued.*

not necessarily a nuisance, and if sound and properly secured and protected, its breaking by an extraordinary wind and injuring a person is too remote for recovery. *City of Allegheny v. Zimmerman* (Penn.), 649.

2. Slaughter-house.] A slaughter-house in a town is not *per se* a nuisance, but may be enjoined when shown to be unavoidably offensive and injurious. *Pruner v. Pendleton* (Va.), 738.

Profanity.] *See* CRIMINAL LAW, 64.

See MUNICIPAL CORPORATION, 1.

OATH.

See CRIMINAL LAW, 525.

OFFICE AND OFFICER.

1. County treasurer — money lost by failure of bank.] A county treasurer, depositing the public funds in a savings bank of good standing, is not liable for their loss by the subsequent failure of the bank. *York County v. Watson* (S. C.), 675.
2. Disability — qualification after election.] One who was disqualified under the Constitution to "hold office" at the time of his election is eligible if the disability was removed before the issuing of the certificate and taking possession of the office. *Priest v. Bickford* (Kans.), 801.

Personal liability of officer.] *See* ABATEMENT, 146.

ORDINANCE.

See MUNICIPAL CORPORATION, 55.

PARENT AND CHILD.

Custody of child — rights of third persons.] Parents, being poor, orally gave their daughter at birth to the mother's sister, who well cared for and kept it five years and a half. The father having acquired wealth, the mother having died, applied for the child. The father was neither unkind nor immoral, but exhibited "a coldness, a lack of energy, and a shiftlessness of disposition," and proposed to put the child with his sister and mother, who had never seen it, the child's mother having been disowned or repudiated by the father's father. *Held*, that the application must be denied. *Chapsky v. Wood* (Kans.), 331.

PARTNERSHIP.

1. What constitutes — loan for profits.] H. agreed to "loan and advance" to M. and L., under the firm name of N. Bros., \$5,000, from time to time, as the business might require; the money to remain a permanent fund not less than one year nor more than five years. In consideration of this, N. Bros. agreed to devote their time and skill to the business, to keep accounts, open to H.'s inspection, and pay him semi-annually three-fifths of the profits, guaranteeing that they should amount to at least \$3,000 annually. For security H. was given a lien on all the firm property. The

PARTNERSHIP — *Continued.*

agreement might be continued by H. for ten years. N. Bros. were to contract no debts outside the business, and not to draw on the firm property except for necessary support. A violation of the contract was to be "regarded as an end of the loan," and H. might then seize all the firm property to satisfy his advances. *Held*, that H. was a partner as to third persons. *Rosenfeld v. Haight* (Wis.), 770.

2. Participation in receipts of hotel as rent.] Where one merely hired the use of another's hotel from day to day, paying daily a sum equal to one-third of the gross receipts and gross earnings, *held* no partnership. *Beecher v. Bush* (Mich.), 465.

See NEGOTIABLE INSTRUMENT, 845.

PATENT.

Liability of right in, to execution.] The right of an inventor in his patent may be reached and sold upon proceedings supplementary to execution. *Pacific Bank v. Robinson* (Cal.), 120.

PAYMENT.

See NEGOTIABLE INSTRUMENT, 66.

PENSION.

Excessive fee recovered back — agency.] Where an agent takes from a pensioner a fee in excess of the statutory allowance for obtaining his pension money, the pensioner may recover the excess from him, although both parties acted innocently and the agent has paid the amount to his principal. *Smart v. White* (Me.), 356.

PERCOLATION.

See WATER AND WATER-COURSE, 497.

PERJURY.

See CRIMINAL LAW, 535.

PLEDGE.

See AGENCY, 818.

PRACTICAL JOKE.

See CONSIDERATION, 588.

PRESUMPTION.

See CRIMINAL LAW, 86.

PROFANITY.

See CRIMINAL LAW, 64.

PROMISSORY NOTE.

Non-negotiable — equities between parties.] The maker of a non-negotiable note, although it was made for the accommodation of the payee, to enable him to borrow money on it, may defeat a recovery by one to whom it has been assigned for value, by showing the want of consideration. *Wetter v. Kiley* (Penn.), 670.

See NEGOTIABLE INSTRUMENT.

PROXIMATE AND REMOTE CAUSE.

See NEGLIGENCE, 280.

PUBLIC POLICY.

See WAGER, 139.

QUALIFICATION.

For office, after election.] *See* OFFICE AND OFFICER, 301.

RAPE.

See CRIMINAL LAW, 86.

REPLEVIN.

See SUNDAY, 476.

RES GESTÆ.

See CRIMINAL LAW, 112.

RESPONDEAT SUPERIOR.

See NEGLIGENCE, 312.

RIOT.

See INSURANCE, 629.

RIPARIAN OWNER.

Right to ice.] *See* WATER AND WATER-COURSE, 196, 330.

SALE.

1. **Conditional — title as to creditors of vendee.]** Where goods are delivered upon lease to be paid for by installments, the title to remain in the vendor until full payment, the judgment creditors of the vendee may seize the same for their claims. *Brunswick & Balke Company v. Hoover* (Penn.), 674.
2. **Of article to be manufactured — title — delivery.]** Where one contracted for articles to be manufactured, and to pay the price partly in installments during the progress of the work, and the balance on completion, and the manufacturer fraudulently representing that the work was substantially completed, obtained the price in full, without delivery, and then made an assignment in insolvency, *held*, that title had not passed as against creditors. *Shaw v. Smith* (Conn.), 170.

SALE — *Continued.*

3. Of colts to be foaled — delivery.] A contract that all the colts to be foaled by certain mares sold by A. to B., and kept in A.'s stables under B.'s care, were to belong to B., is a valid contract of sale, and not void as against creditors for want of delivery. *Hull v. Hull* (Conn.), 165.
4. Delivery — change of possession.] The defendant, in the employment of M. on his farm, agreed to buy of M. a horse then on the farm and apply his wages to the payment. Two years afterward M. sold and delivered the horse to him, taking his receipt in full of wages earned in payment. The defendant continued in M.'s employment on the farm, the horse remained in M.'s stable, the defendant taking care of it, breaking it and shoeing it, paying M. for the feed. *Held*, that title did not pass as against M.'s creditors. *Hull v. Signorith* (Conn.), 167.
5. Judicial — caveat emptor.] One purchased land on a foreclosure sale, relying on a recorded satisfaction of a prior mortgage. Learning that the satisfaction was forged, she refused to complete. *Held*, that she should not be compelled to comply, unless the validity of the title should first be legally and judicially established. *City of Charleston v. Blohme* (S. C.), 690.
6. Lease of organ.] An organ was delivered on a written agreement for a specified "rent," part of which was paid in a melodeon delivered by the vendee, and part in a note executed by him, payable in about two years, "with the understanding that if I shall have punctually paid all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ." The organ having been returned, *held*, that no action could be maintained by the vendor on the note, the transaction being not a lease, but a conditional sale. *Hine v. Roberts* (Conn.), 170.
7. Rental of sewing machine.] A contract to "rent" a sewing machine, for a certain whole sum payable at the expiration of fifteen months, with interest after maturity, the title to the machine until payment to remain in the lessor, and the lessor to have the right of retaking on default of payment, is a sale, and is valid. *Singer Manufacturing Company v. Cole* (Lea), 30.

See AGENCY, 775; STATUTE OF FRAUDS.

SCHOOLS.

See CONSTITUTIONAL LAW, 196.

SENTENCE.

Commutation.] *See* CONSTITUTIONAL LAW, 495.

See CRIMINAL LAW, 694.

SETTLEMENT.

Ante-nuptial.] *See* DEED, 617; WILL, 646.

SLANDER AND LIBEL.

1. **Charge that merchant has executed mortgage.]** Falsely to charge that a merchant has executed a chattel mortgage is not actionable *per se*, and special damage cannot be predicated of such a charge without explicit proof connecting it therewith. *Newbold v. The J. M. Bradstreet & Son* (Md.), 426.
2. **Privileged communication.]** The report of a committee of a lodge of Odd Fellows, recommending the expulsion of a member for false swearing, made in accordance with the rules and customs of the order, and published in a pamphlet account of the transactions of the lodge, for the use of the members, according to the ordinary practice, is *prima facie* privileged. *Kirkpatrick v. Eagle Lodge* (Kans.), 816.
3. — **"bad moral character."]** To prevent a town superintendent of schools from licensing an applicant as a teacher, persons interested in the school in question represented to the superintendent, in a petition and affidavit, that the applicant was a person of bad moral character and unfit to have charge of a school. Being sued by him for libel they justified, and showed that he was habitually profane and a Sabbath breaker. *Held*, (1) that the justification was made out; (2) that the communication was privileged. *Wieman v. Mabes* (Mich.), 477.

STATUTE.

1. **Charity, public — masonic lodge.]** A masonic lodge is not a public charitable or benevolent institution. *Bangor v. Masonic Lodge* (Me.), 369.
2. **Construction — "malice."]** The defendant shipped hogs, taking a bill of lading, got a discount of his draft on the consignee with the bill of lading as collateral security, and afterward, and before the presentation of the draft, collected pay for the hogs on the consignee. The lender recovered judgment against him on an allegation of fraud, and he was imprisoned under it. *Held*, that "malice" was the "gist of the action," within the meaning of the statute of civil imprisonment. *First National Bank of Flora v. Burkett* (Ill.), 209.

Construction.] *See* LIMITATION, 320.

See CONTRACT, 720; CRIMINAL LAW, 694; EMINENT DOMAIN, 743; WATER AND WATER-COURSE, 330.

STATUTE OF FRAUDS.

1. **Guaranty.]** A guaranty by a debtor of a note to a third person turned out for his debt is not within the statute of frauds. *Eagle Moving & Reaping Machine Company v. Shattuck* (Wis.), 780.
2. **Memorandum — signed by agent.]** A memorandum of sale, written by a vendor in his book, and signed by him, and by the purchaser's agent in his own name, held, a valid contract, not to be varied by parol. *Wiener v. Whipple* (Wis.), 775.
3. — **sufficiency of.]** A memorandum signed by A. alone, whereby he agrees to furnish B. with a specified quality of ice, at a specified price per ton, but not specifying time of delivery or of payment, is sufficient.

STATUTE OF FRAUDS — *Continued.*

under the statute of frauds, and not to be varied by parol proof of the agreement for particular time of delivery or payment. *Williams v. Robinson* (Me.), 853.

See FRAUD.

STATUTE OF LIMITATION.

See LIMITATION.

SUNDAY.

1. **Carrying cattle on.]** It is lawful for a common carrier to transport cattle on Sunday. *Philadelphia, Wilmington and Baltimore Railroad Company v. Lehman* (Md.), 415.
2. **Contract on — when complete.]** On Sunday two parties agreed on the terms of sale of a yoke of oxen, subject to the purchaser's inspection of the oxen and satisfaction with them. The next day the purchaser inspected the oxen, approved and took them, and left a part of the price at the vendor's house. *Held* a valid sale. *Moseley v. Vanhooser* (Len), 37.
3. **— ratification — replevin.]** Replevin lies for a horse sold and delivered on Sunday, although the contract was ratified on a week day. *Winfield v. Dodge* (Mich.), 476.
4. **Mortgage on.]** A mortgage executed on Sunday is not void either at common law or under a statutory prohibition of the exercise on that day of acts in the "ordinary calling" of the citizen. *Hellams v. Abercrombie* (S. C.), 684.
5. **Necessity — selling cigars.]** Selling cigars on Sunday is not a work of necessity. *Mueller v. State* (Ind.), 245.

SURETY.

Foreclosing collateral mortgage before payment — bar.] A surety secured by a collateral mortgage may foreclose it before paying the debt to the principal, and for the whole amount of his liability, although the creditor has obtained judgment for less. *Hellams v. Abercrombie* (S. C.), 684.

See BANK, 239; LIMITATION, 23; MARRIAGE, 705.

SURFACE WATER.

See WATER AND WATER-COURSE, 519.

SURVIVORSHIP.

See MARRIAGE, 50.

TAXATION.

Telegraph line.] A telegraph line is taxable as real estate, although it has paid a privilege tax. *Western Union Telegraph Company v. State* (Bart.), 99.

See CONSTITUTIONAL LAW, 606.

TELEGRAPH.

Damages—injury to feelings.] A telegraph company is liable for injury to the feelings of a son by willful neglect to deliver to him a message announcing the death of his mother, whereby he was prevented from attending her funeral. *So Rolfe v. Western Union Telegraph Company* (Tex.), 805.
See TAXATION, 99.

TRUST.

Illegal for uncertainty.] A devise in trust to build a free school-house, and extend the education of poor children, is void at law for uncertainty.
Stonestreet v. Doyle (Va.), 781.

Declaration of.] *See DEED, 756.*

UNDUE INFLUENCE.

See FRAUD, 81.

USURY.

1. **Commissions for advances.]** A contract to pay, as commissions to a commission merchant, two per cent in addition to legal interest, for moneys advanced, is usurious. *Stark v. Sperry* (Lea), 47.
2. **—.]** Charging interest on monthly balances, according to the custom of stock-broker, does not constitute usury. *Hatch v. Douglass* (Conn.), 154.
3. **Right of purchaser in bankruptcy to plead.]** A purchaser, at a sale by an assignee in bankruptcy, of land subject to a mortgage of which he has notice, cannot set up usury against the mortgage. *Nance v. Gregory* (Lea), 41.

VESTED RIGHTS.

See CONSTITUTIONAL LAW, 60.

WAGER.

1. **"Game"—public policy—check—bona fide holding.]** A wager as to whether an execution can be collected is not "gaming," nor a wager upon a "game," but is void as against public policy, as between the original parties, but valid as to a bona fide transferee of a check given therefor. *Boughner v. Meyer* (Colo.), 139.
2. **On horse-race.]** A wager on a horse-race is void as against morals and public policy. *Gridley v. Dorn* (Cal.), 110.

WAIVER.

See INSURANCE, 295.

WATER AND WATER-COURSE.

1. **Contract for sale of land—boundary on stream.]** On a contract for a sale at a fixed price per acre, of land bounded on the side of a river, and following the meanderings of the river, the river being navigable only for flatboats and rafts at high water, the vendee is bound to pay only for the

WATER AND WATER-COURSE — *Continued.*

- land extending to low-water mark and the islands between that and the center of the stream, and not for the land under ordinary water. *Holbert v. Eldens* (Lea), 26.
2. **Diverting spring — percolation.**] One may not divert a spring on his land to the injury of a prior appropriator to whom the water naturally comes through a creek by percolation from the spring. *Strait v. Brown* (Nev.), 497.
 3. **Fouling stream — injury to land.**] In working a coal mine the defendant caused the *debris* to be deposited in a natural stream of water, and the same in the rainy season was carried and left on the plaintiff's land by the natural flow of the stream. *Held*, that the defendant was liable for the injury. *Robinson v. Black Diamond Coal Company* (Cal.), 118.
 4. **Injunction against fouling — joint wrong-doers.**] The defendant, proprietor of a slaughter-house on a stream, had for eight years been in the habit of discharging the blood and offal into the stream. Other persons, proprietors of slaughter-houses, breweries, soap factories and the like, also discharged the refuse of their establishments in like manner. The effect was to damage the plaintiff, proprietor of a flour mill which had been for thirty years established lower down the stream, by rendering the water offensive, tainting the air, and injuring the health of his operatives. *Held*, that the defendant should be enjoined. *Woodyear v. Schaffer* (Md.), 419.
 5. **Riparian owner's right to ice in navigable river.**] A riparian owner on a navigable stream has no superior right to the ice formed in it opposite his land, but it belongs to the first appropriator. *Wood v. Fowler* (Kans.), 890.
 6. **Statute.**] A riparian owner on a navigable river owns only to the bank, and his ownership is not extended to the center by a statute declaring the river non-navigable. *Id.*
 7. —.] A riparian owner on a navigable stream above tide-water owns the ice formed in it opposite his land to the center. *Washington Ice Company v. Shortall* (Ill.), 196.
 8. **Surface water — obstruction of.**] The parties owned adjacent lots on a street. Surface water naturally and usually accumulated in the street in front of the plaintiff's lot, and sometimes ran off through a natural depression over defendant's lot and other low land to a river. Defendant built a house on his lot, filling in the lot and grading it up to the level of the sidewalk on the street, thereby cutting off the flow of the surface water and causing it sometimes to flow on plaintiff's lot and flood his cellar. *Held*, that no action would lie therefor. *Barkley v. Wilcox* (N. Y.), 519.

See EVIDENCE, 380.

WILL.

1. **Devise — subsequent limitation.**] A testator devised his whole estate to M. in fee-simple absolute. By a subsequent clause he provided that if M. should die intestate, the whole estate should go in a different line. *Held*,

WILL — *Continued.*

that M. took absolutely, the limitation over, dependent on a condition subsequent, being void. *Moore v. Sanders* (S. C.), 708.

2. Parol evidence to correct.] The plaintiff's complaint stated in substance that the testator had borrowed money of his wife, to buy the "north-east quarter of the south-east quarter" of a section of land, agreeing to devise the land to her for life with remainder to her children; that he executed his will, intending to conform to that agreement, but by mistake the will described the land as the "north-east quarter of the south-west quarter," and that he owned no such land, and no other land than the lot misdescribed. *Held*, that parol evidence of such facts was inadmissible. *Judy v. Gilbert* (Ind.), 289.

3. Revocation — "mutilation."] A statute provided that no will shall be revoked unless the testator shall destroy or "mutilate" the same. A testator drew pencil lines across his signature, with intent to revoke, but left the signature still legible. *Held* a "mutilation." *Woodfill v. Patton* (Ind.), 269.

Contract to make.] *See* CONTRACT, 595.

See MARRIAGE, 187, 646

WITNESS.

See CRIMINAL LAW, 787; EVIDENCE, 295.

WOMEN.

See CONSTITUTIONAL LAW, 125.

WORDS.

- "Appurtenances."] *See* DEED, 377, 581.
- "Bad moral character."] *See* SLANDER AND LIBEL, 477.
- "Cease to be operated."] *See* INSURANCE, 68.
- "Fiduciary character."] *See* BANKRUPTCY, 330.
- "Malice."] *See* STATUTE, 209.
- "Game."] *See* WAGER, 139.
- "Manufacturing establishment."] *See* INSURANCE, 440.
- "Mutilation."] *See* WILL, 269.
- "Necessity."] *See* SUNDAY, 245.
- "Ordinary prudence."] *See* CRIMINAL LAW, 71.
- "Premises."] *See* INSURANCE, 440.
- "Public charity."] *See* STATUTE, 369.
- "Rights and franchises."] *See* EMINENT DOMAIN, 743.
- "Riot."] *See* INSURANCE, 639.

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